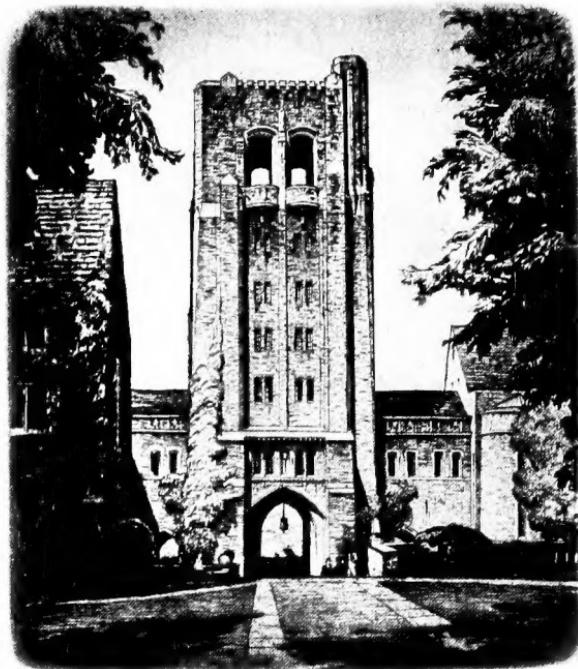




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A TREATISE  
ON THE  
**LAW OF LANDLORD  
AND TENANT**

INCLUDING

LEASES, THEIR EXECUTION, SURRENDER, AND RENEWAL,  
THE PARTIES THERETO, AND THEIR RECIPROCAL  
RIGHTS AND OBLIGATIONS, THE VARIOUS KINDS  
OF TENANCY, THE USE AND POSSESSION OF  
THE PREMISES THE CHARACTER OF  
RENT AND THE REMEDIES FOR ITS  
RECOVERY, THE TENANT'S RIGHT  
TO FIXTURES, &c., &c.

WITH

FULL REFERENCES TO THE LATEST AMERICAN  
AND ENGLISH CASES AND TO RELEVANT  
AMERICAN AND ENGLISH STATUTES,  
BOTH ANCIENT AND MODERN

BY  
*Henry*  
**H. C. UNDERHILL,**  
OF THE NEW YORK BAR

Author of a "Treatise on the Law of Evidence," a "Treatise  
on the Law of Criminal Evidence," a "Treatise on the Law of  
Wills," and of the article "Criminal Law," in the "Cyclopedia  
of Law and Procedure."

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# LANDLORD AND TENANT.

## CHAPTER XVIII.

### THE RIGHTS OF THE TENANT TO POSSESSION.

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§ 413. **The tenant's right to possession of the premises.** Upon the question of the existence of an implied covenant by the lessor to give the lessee the possession of the demised premises the cases are not in harmony. The English rule is that one who leases premises by implication agrees to put the tenant in possession, and if he shall fail to do so, the tenant may recover damages from him. The tenant is not bound to bring an action of ejectment against one who wrongfully occupies the premises.<sup>1</sup>

<sup>1</sup> Coe v. Clay, 5 Bing. 440, 3 M. 30 R. R. 699; Jinks v. Edwards, & P. 57, 7 L. J. (O. S.) C. P. 162, 11 Ex. 775, 4 W. R. 303.

The English rule is followed in some of the states.<sup>2</sup> The majority of the American cases hold however that where the demised premises are wrongfully held by a third person it is not incumbent on the lessor to put the lessee in possession even though the lease contain an express covenant for quiet enjoyment.<sup>3</sup> It is useless perhaps to endeavor to reconcile decisions which are so absolutely diverse. The following considerations may be of value. It is conceded that there is an implied covenant by the landlord for quiet enjoyment in every lease and that, by reason of such implied covenant, the lessor will be liable to the lessee where the latter is evicted by the former or by a third person claiming a paramount title. The lessee if he cannot maintain his possession against ejectment by reason of the weakness of his lessor's title may surrender possession and sue the lessor for the eviction. As against trespassers during the term the lessee has no such remedy and must defend against them himself. If by a statute or a rule of court an incoming tenant has the same remedy to oust a trespasser who is found in possession by him as he has to oust one who intrudes upon his possession during the term of the lease there seems to be no necessity for implying an agreement by the landlord to deliver the possession. Where this is not the case it would seem only proper and reasonable that the landlord should be compelled at his own cost to deliver the possession of the leased premises to the lessee. Up to the moment the lease is executed the lessor has the right to the possession

<sup>2</sup> King v. Reynolds, 67 Ala. 229, 233; Cohn v. Norton, 57 Conn. 480, 18 Atl. Rep. 595; Hughes v. Hood, 50 Mo. 350; L'Hussier v. Zallee, 24 Mo. 13, 15. See, also, Michau v. Walsh, 6 Mo. 346; Poposken v. Munkwitz, 62 Wis. 32, where it is held that when the time arrives for the lessee to take possession according to the terms of the lease the premises must be open to him or the lessor shall suffer the consequences. See, also, Spencer v. Burton, 5 Blackf. (Ind.) 57, 59; Clark v. Butt, 26 Ind. 236, 238; Dougherty v. Wilson, 1 Blackf. (Ind.) 478.

<sup>3</sup> Rice v. Whitmore, 74 Cal. 619,

16 Pac. 501, 5 Am. St. Rep. 479; Gardner v. Keteltas, 3 Hill. (N. Y.) 330, 38 Am. Dec. 637, followed in Sullivan v. Schmitt, 93 App. Div. 469, 470; Ward v. Edesheimer, 17 N. Y. Supp. 173; Prendersgast v. Young, 21 N. H. 234; Sigmund v. Howard Bank, 29 Md. 324; Long v. Noe, 49 Mo. App. 13; Underwood v. Birchard, 47 Vt. 305; Palmer v. Young, 108 Ill. App. 252; Gazzolo v. Chambers, 73 Ill. 75. See, also, Wilson v. Douglas, 2 Strobh. (S. C.) 97; Becker v. De Forest, 1 Sweeney (N. Y.) 528, 31 N. Y. Super. Ct. Rep. 528; Cozens v. Stevenson, 5 S. & R. (Pa.) 421.

and if this right to possession is transferred by the lease to the tenant it is absurd to refuse to compel the lessor who has received valuable consideration for it, to transfer what he has agreed to transfer. If the premises are held adversely when the lease is about to be made, and the lessee knowing this then refuses to sign, the lessor will have to eject the intruder himself. Why then should the lessor escape this liability to eject a trespasser merely because the lessee did not know a trespasser was in possession when he received his lease at the hands of the lessor. This reasoning applies with much greater force when a lease provides for an entry by the lessee in the future and the premises being then unoccupied within the knowledge of both the parties to the lease a third person enters thereafter and before the tenant enters and is in possession when the time arrives for the tenant to enter.<sup>4</sup> While it may be true that it is not the duty of a landlord to eject a trespasser who is wrongfully in possession at the tenant's entry for the benefit of a tenant to whom he has given a lease and who is desirous of entering thereunder,<sup>5</sup> this principle cannot be invoked to exempt the landlord from damages where the trespasser or occupant has been placed in the possession by the act of the landlord himself. If a landlord after leasing premises to one person subsequently leases them to another before the commencement of the term first created and the second lessee goes into possession as a consequence of which action the first lessee is deprived of the possession he may recover damages for the failure of the landlord to deliver the possession.<sup>6</sup> The landlord having failed to deliver the possession of the premises to the first lessee cannot of course recover rent from him.<sup>7</sup> And if the incoming tenant is by his landlord in this manner prevented from entering upon a portion of the premises,

<sup>4</sup> King v. Reynolds, 67 Ala. 229, 232, 233. Where a lessor expressly covenants to put a lessee in possession in the future, a subsequent trespass by a third person before the lessee has entered is a breach of this covenant. Snodgrass v. Reynolds, 79 Ala. 452, 58 Am. Rep. 601.

<sup>5</sup> Sullivan v. Schmitt, 93 App. Div. 469, 87 N. Y. Supp. 714, 715;

Gardner v. Keteltas, 3 Hill (N. Y.) 330, 38 Am. Dec. 637.

<sup>6</sup> Trull v. Granger, 8 N. Y. 115; Sullivan v. Schmidt, 93 App. Div. 468, 87 N. Y. Supp. 714, 715.

<sup>7</sup> Smith v. Barber, 96 App. Div. 236, 89 N. Y. Supp. 317; Harris v. Greenberger, 50 App. Div. 439, 64 N. Y. Supp. 136, 98 N. Y. St. Rep. 136.

the fact that he pays rent for the part he does occupy under protest is not a waiver of any claim for damages he may have for being kept out of possession of the other part.<sup>8</sup> Where a tenant enters into the possession of premises which have been leased to him he is thereafter liable for their rent as a whole and he cannot, because he has not the full possession of the premises, refuse to pay the rent. His remedy is to recover his damages for the failure to deliver full possession either by a counterclaim in an action for the rent or in a separate action.<sup>9</sup>

**§ 414. The lease of an unfinished building.** Ordinarily a lease of a building which is not complete and ready for occupation when the lease is made, implies that it shall be complete at the commencement of the term.<sup>10</sup> Thus, the lease of an unfinished building to be occupied for a particular purpose by the tenant implies that the building will be finished by the time the tenant is ready to occupy it for that purpose.<sup>11</sup> Sometimes there is an express agreement that the landlord will complete the building for the tenant by the time he is ready to enter. Such a stipulation to the effect that the premises will be completed by a certain time requires that the landlord shall have them substantially complete, so that the tenant may occupy the premises with reasonable safety for the purposes intended. It is not necessary that the premises shall be complete in every detail.<sup>12</sup> Thus a stipulation that the building shall be finished by a date named and that certain rooms shall be in order for the tenant to use the premises as a shoe store, does not necessarily mean that the cellar of the premises shall be absolutely dry enough to use for that purpose.<sup>13</sup> The landlord is usually entitled to notice requiring him to complete the premises if the tenant enters thereon before the premises are finished. The completion of the premises

<sup>8</sup> An agreement by a tenant to pay rent before he shall obtain the possession implies an agreement by the lessor to deliver actual possession to him on a tender of the rent. *Harris v. Greenberger*, 50 App. Div. 439, 64 N. Y. Supp. 136, 98 N. Y. St. Rep. 136.

<sup>9</sup> *O'Brien v. Smith*, 13 N. Y. Supp. 408, affirmed without opinion in 129 N. Y. 620, 29 N. E. Rep.

1029; *Smith v. Barber*, 96 App. Div. 236, 89 N. Y. Supp. 317, 320.

<sup>10</sup> *Paul B. Pough & Co. v. Cerimedo*, 88 N. Y. Supp. 1054.

<sup>11</sup> *La Farge v. Mansfield*, 31 Barb. (N. Y.) 345.

<sup>12</sup> *Swift v. East Waterloo Hotel Co.*, 40 Iowa, 322.

<sup>13</sup> *Bently v. Taylor (Iowa)*, 39 N. W. Rep. 267.

may under some circumstances be a condition precedent to a right by the landlord to enforce the lease against the tenant. Thus, where premises are leased for a term which is to commence when they are "finished and ready for the occupation of the lessee," the fact that they are never finished is a good defense in an action against the lessee on his covenant to pay rent. While the entry by the lessee may, under some circumstances waive the claim that the premises are not complete, an entry and an occupation by the lessee for a time under a mistaken belief on his part that the premises were finished is not a waiver of his right to allege that they were not finished where the particulars in which they were unfinished were not obvious and were in fact unknown to the lessee.<sup>14</sup> A tenant who has agreed to take a term in a building which is to be completed after the execution of the lease, may, by his conduct, waive a claim he may have for damages by reason of the failure or the neglect of the landlord to complete the building in time. Accordingly where a lessee enters into the premises and pays rent in monthly installments for over two years, he waives any claim he may have for a reduction of the rent for that period upon the grounds that the building was not completed according to agreement.<sup>15</sup> It is sometimes provided in the case of buildings which are incomplete that rent shall be computed only from the time the premises are "ready for occupancy." The meaning of this expression depends upon the circumstances of each case. It may be the duty of the landlord to notify the tenant when the premises are ready for occupancy. If he does this and the tenant does not enter into possession, the rent will begin to run from the date when the tenant ought to have entered into possession. Whether or not premises are ready for occupancy is a question of fact. A substantial compliance with the provision is all that is required. They would certainly have to be safe for the tenant's purpose, but they need not be complete in every detail, if the tenant can occupy the premises without material hindrance. Thus, a provision that premises shall be "ready for occupancy" has been held not to mean that they shall be fitted up with fixtures ready for the use of the lessee in his business.<sup>16</sup>

<sup>14</sup> Clark v. Spaulding, 20 N. H. 313, 316.      <sup>16</sup> Gerry v. Siebrecht, 88 N. Y. Supp. 1034.

<sup>15</sup> Murphy v. Marshall, 179 Pa. St. 516, 39 W. N. C. 446.

**§ 415. The entry of the tenant before the commencement of the term.** An incoming tenant sometimes enjoys a privilege of entering on the premises before the date on which his term begins. This privilege often exists in the case of farm land to give him an opportunity to plow and to sow the land. The privilege may be expressly created by the lease or, in the case of farm lands, may be based upon the custom of the country. The tenant alleging such a custom must prove it. If the custom be inconsistent with the express terms of the lease the latter will prevail. The acquiescence of the outgoing tenant during whose term an incoming tenant has entered to sow wheat does not prevent the latter from proving the custom particularly where it is contended that the silence of the outgoing tenant conferred some rights upon the incoming tenant who had entered.<sup>17</sup>

**§ 416. The remedy of the lessee for the lessor's failure to give him the possession.** Though a lessee may have the absolute right to the possession of the premises under his lease at the beginning of his term, he has no right to enter the premises with force and to eject the lessor.<sup>18</sup> Nor can he forcibly eject a person who is in the possession of the premises under a claim from the lessor. It was formerly the rule that a lessee to whom possession had not been delivered at the beginning of the term could bring an action of ejectment against a prior lessee who was holding over, or against any occupant of the premises who denied him possession. To such an action the lessor was not a necessary party.<sup>19</sup> Under the earlier decisions this was the sole remedy of the lessee who was kept out of possession.<sup>20</sup> And it was also held that, inasmuch as the lessee had an action of ejectment to oust a prior lessee or trespasser holding over, he could not also maintain an action for damages against his lessor upon an implied covenant for quiet entry and possession.<sup>21</sup> The lessee might

<sup>17</sup> Stephenson v. Elliott, 2 Ind. App. 233, 235, 28 N. E. Rep. 326. Though custom is usually invoked to justify an entry to sow land it is equally applicable to an entry for any other legitimate and proper purpose as to erect an ice-house upon the demised premises. State v. McClay, 1 Har. (Del.) 520.

<sup>18</sup> Michau v. Welsh, 6 Mo. 346.

See, also, Crotty v. Collins, 13 Ill. 567.

<sup>19</sup> Boyce v. Graham, 91 Ind. 420.

<sup>20</sup> Gazzolo v. Chambers, 73 Ill. 75; Boyce v. Graham, 91 Ind. 420; Gardner v. Keteltas, 3 Hill (N. Y.) 330, 38 Am. Dec. 637.

<sup>21</sup> Gardner v. Keteltas, 3 Hill (N. Y.) 330, 332.

maintain ejectment before entry. The rule has always been otherwise where the lessee is kept out of possession by the lessor himself by reason of the lessor's denial that the lessee was entitled to the possession. The lessee is not under these circumstances compelled to bring an action of ejectment against the lessor but he may at once sue him for all damages sustained.<sup>22</sup> At present the rule is very different. A lessee who has paid rent in advance or who, not having paid rent in advance, has an agreement with his lessor that he is to go into possession on a date certain, and, who when the date arrives is unable to go into possession, because the premises are occupied by another tenant of the same landlord if the landlord refuses to oust the intruder and to give possession, is not compelled to do so himself. He may abandon the lease and then sue his lessor on the implied covenant for peaceable and undisturbed possession.<sup>23</sup> In such an action the question whether there was a contract between the parties and whether the lessor refused to comply with it, is where the evidence is at all conflicting a question of fact for the jury.<sup>24</sup> Under an agreement by a landlord to give a lease, and to put the prospective tenant into possession as soon as he could get the present tenant out, it is for a jury to determine whether the landlord has properly performed his agreement. The mere fact that the new tenant has waited nine months for possession, does not seem to be enough alone to show that the landlord has failed to keep his agreement.<sup>25</sup>

**§ 417. Unlawful detainer against the occupant.** Under some of the local statutes a lessee having a right to the immediate possession of the premises may maintain an action to recover the possession against a prior lessee who is holding over. The statutes must in every case be consulted to ascertain the procedure.<sup>26</sup>

<sup>22</sup> *Trull v. Granger*, 8 N. Y. 114, 119. It has been held in *Berrington v. Casey*, 78 Ill. 317, that a lessee might have elected between an action of ejectment against a prior lessee, and an action of *assumpsit* against his lessor on an implied covenant to give him quiet entry and possession.

<sup>23</sup> *Trull v. Granger*, 8 N. Y. 115; *Brennan v. Jacobs* (Pa.), 15 Atl.

Rep. 685; *Albey v. Weingart* (N. J. Law, 1904), 58 Atl. Rep. 87.

<sup>24</sup> *Shoemaker v. Crawford*, 82 Mo. App. 487.

<sup>25</sup> *Leininger v. Clarke Nat. Bank*, 97 Minn. 364, 107 N. W. Rep. 396.

<sup>26</sup> *Ball v. Chadwick*, 46 Ill. 28; *Webb v. Heyman*, 40 Ill. App. 335 (permitting an action of forcible detainer); *Marsters v. Cling*, 163

Though it is safest and often indispensable for the lessee claiming the possession to notify the occupant of his claim and to demand a surrender to him of the premises, it has been held unnecessary to do this in the case of a tenant at will holding over.<sup>27</sup> After a reasonable notice to quit and a reasonable opportunity to remove from the premises tenants at will become tenants at sufferance and may be liable to an action of forcible entry and detainer by a lessee.<sup>28</sup>

**§ 418. The rights of the landlord against third persons during the term.** As soon as a tenant enters upon the possession of the demised premises under the lease the landlord parts with all his rights of control during the term and his rights to recover damages for interference with that control except so far as injuries to the reversion are concerned.<sup>29</sup> After the date on which under the terms of the lease the tenant enters, or has a right to enter upon the possession of the premises the rights of the landlord during the term so far as third persons are concerned who are strangers to the lease are absolutely confined to the protection of the reversionary interests of the landlord. By this is meant that he can recover damages as against third persons only for such injuries as do or would affect and diminish the permanent value of the freehold either by decreasing the

Mass. 477, 40 N. E. Rep. 763; Hildreth v. Conant, 10 Met. (Mass.) 298; Furlong v. Leary, 8 Cush. (Mass.) 409; Burton v. Rohrbeck, 30 Minn. 393, 15 N. W. Rep. 678.

<sup>27</sup> Hildreth v. Conant, 10 Met. (Mass.) 298. But see Furlong v. Leary, 8 Cush. (Mass.) 409, and Alexander v. Carew, 13 Allen (Mass.) 70.

<sup>28</sup> Casey v. King, 98 Mass. 503. A statute which gives a summary remedy to secure possession to "the party entitled to possession" against a tenant holding over may be invoked by the owner's lessee. Burton v. Rohrbeck, 30 Minn. 393, 15 N. W. Rep. 678. The contrary was held under a statute which gives a right to a summary proceeding "the per-

son entitled to the premises." Spalding v. Hall, 6 D. C. 123, and see Imbert v. Hallock, 23 How. Prac. (N. Y.) 456. In the absence of statute a justice of the peace has no jurisdiction to entertain an action by a lessee to remove the lessor from the premises, such action being neither one for forcible detainer nor one for the detention of real property. Krumweide v. Schroeder, 56 Iowa, 160; Goodwine v. Barnett, 2 Ind. App. 16, 28 N. E. Rep. 115. So a lessee never in possession cannot maintain unlawful detainer against his lessor at common law. Long v. Noe, 49 Mo. App. 19, 21.

<sup>29</sup> Sunasack v. Morey, 98 Ill. App. 505.

market value of the property or diminishing the rent which the landlord would receive for the premises after the lease is at an end.<sup>30</sup> For it is a well settled and ancient rule of the common law that the landlord in case of a term for years cannot maintain an action for trespass *quare clausum fregit* against a stranger for an injury occasioned during the term and while the premises are in the possession of a tenant.<sup>31</sup> The reason of this is that according to common law rules possession, actual or constructive, is necessary to maintain an action of trespass *quare clausum fregit* as this action, as its name implies, means that the plaintiff's barriers had been broken down and his quiet and peaceable possession invaded and interfered with by the defendant. As the landlord is out of possession, his possession cannot be disturbed and if he desires redress, he must move his tenant, who has the actual possession with all its rights to bring an action against the intruder.<sup>32</sup> At the common law however a landlord was not without his remedy for injuries done to his reversion during the existence of the term, nor was he compelled to delay his action for damages until its expiration. He had what was called an action on the case or, speaking more correctly, an action of trespass on the case for all injuries done by a stranger to the inheritance or reversionary interest of the landlord during the

<sup>30</sup> Noyes v. Stillman, 24 Conn. 15; Mayer v. Kyon, 69 Ga. 577; Younggreen v. Shelton, 101 Ill. App. 89; Indiana, I. & I. R. Co. v. Patchette, 59 Ill. App. 251; Barber v. Shannon, 1 Ind. Ter. 199, 40 S. W. Rep. 584; Walden v. Conn, 84 Ky. 312, 1 S. W. Rep. 537, 4 Am. St. Rep. 204; Davis v. Nash, 32 Me. 411; Perry v. Bailey, 94 Me. 50, 46 Atl. Rep. 789; Moody v. Cummiskey, 9 Pick. (Mass.) 104; Starr v. Jackson, 11 Mass. 519; French v. Fuller, 23 Pick. (Mass.) 104; Geer v. Fleming, 110 Mass. 39; Hersey v. Chapman, 162 Mass. 176, 179; Cushing v. Kenfield, 5 Allen (Mass.) 307; Daniels v. Pond, 21 Pick. (Mass.) 367, 371, 32 Am. Dec. 269; Winston v. Pres-

ident, etc., of Franklyn Academy, 28 Miss. 118, 121, 61 Am. Dec. 540; Arnold v. Bennett, 92 Mo. App. 156; Plumer v. Harper, 3 N. H. 88; Davis v. Jewett, 13 N. Y. 88, 91; Kernochan v. Manhattan Ry. Co., 161 N. Y. 339, 55 N. E. Rep. 906; Taylor v. Wright, 51 App. Div. 97, 64 N. Y. Supp. 344; Peck v. Cain (Tex. 1901), 63 S. W. Rep. 177; Jackson v. Pesked, 1 M. & S. 234; Jesson v. Gosford, 4 Burr. 2144; Baxter v. Taylor, 4 B. & Ad. 72; Bower v. Hill, 1 Bing. N. C. 555.

<sup>31</sup> Perry v. Bailey, 94 Me. 50, 46 Atl. Rep. 789.

<sup>32</sup> 4. Kent, Comm. 119; Lienow v. Ritchie, 8 Pick. (Mass.) 235; Starr v. Jackson, 11 Mass. 519.

time the land was rented to, and occupied by the tenant.<sup>33</sup> In fact any injury to the leased property occurring during the tenancy may create two causes of action one of which will arise in favor of the tenant, who must of necessity suffer some injury, and another will arise in favor of the lessor if the injurious act or intrusion shall work an injury to the reversion. The landlord and the tenant may both maintain actions at the same time for injuries to the soil or the buildings by a third person. They may both be injured but in a different degree and manner. The tenant may be injured by an interruption to his possession and enjoyment causing a loss and diminution of his profits; the landlord may be injured by a permanent injury to the reversion resulting in a loss to him of rental value. Either may have an action for damages, the amount to be recovered depending upon their respective interests.<sup>34</sup> The injury which will sustain such an action by the lessor must be one of a permanent character involving some destruction of the land itself. Thus a lessor may bring trespass against one who entering upon the land cuts down and carries away trees,<sup>35</sup> or who cuts down a hedge inclosing

<sup>33</sup> *Brown v. Bridges*, 31 Iowa, 138; *Fitch v. Gosner*, 54 Mo. 267; *Bulkley v. Dolbeare*, 7 Conn. 232; *Barbee v. Shannon*, 1 Ind. Ter. 199, 40 S. W. Rep. 584; *Davis v. Nash*, 32 Me. 411; *Coney & Parker v. Brunswick & F. Steamboat Co.*, 116 Ga. 222, 42 S. E. Rep. 498; *Starr v. Jackson*, 11 Mass. 519; *Cushing v. Kenfield*, 5 Allen (Mass.) 307; *Perry v. Bailey*, 94 Me. 50, 46 Atl. Rep. 789; *Daniels v. Pond*, 21 Pick. (Mass.) 367, 371, 32 Am. Dec. 269; *Hersey v. Chapin*, 162 Mass. 176, 179, 38 N. E. Rep. 442; *Winston v. President, etc., of Franklyn Academy*, 28 Miss. 118, 121, 61 Am. Dec. 540; *Cramer v. Groseclose*, 53 Mo. App. 648; *Bailey v. A. Seigel Gas Fixture Co.*, 54 Mo. App. 50; *Ridge v. Railroad Transfer Co.*, 56 Mo. App. 133; *Korn v. N. Y. Elevated Railroad Co.*, 60 Hun (N. Y.) 583, 15 N. Y. Supp. 10; *Ottinger v. New*

*York Elevated Railroad Co.* 60 Hun (N. Y.) 583, 15 N. Y. Supp. 18; *Macy v. Metropolitan Elevated Railroad Co.*, 59 Hun, 365, 12 N. Y. Supp. 804; *Freer v. Stotenburg*, 34 How. (N. Y.) Prac. Rep. 440, 446; *Vance v. San Antonio Gas Co. (Tex.)*, 60 S. W. Rep. 317.

<sup>34</sup> *Starr v. Jackson*, 11 Mass. 519; *Baker v. Saunderson*, 3 Pick. (Mass.) 348; *Davis v. Jewett*, 13 N. H. 88, 91; *Plumer v. Harper*, 3 N. H. 88; *George v. Fisk*, 32 N. H. 32, 45; *Halsey v. Lehigh Valley R. Co.*, 45 N. J. Law, 26; *Rolles' Abr. "Trespass,"* N. 3, 4, 5, 67; *Vin. Abr. "Trespass,"* 3, 4; *Co. Litt.* 57a; note 2; 2 *Chitty, Pl.* 386; *Davis v. Nash*, 32 Me. 411; *Starr v. Jackson*, 11 Mass. 579.

<sup>35</sup> *Bulkley v. Dolbeare*, 7 Conn. 232; *Cramer v. Groseclose*, 53 Mo. App. 648; *Fitch v. Gosner*, 54 Mo. 267.

lands leased by him,<sup>36</sup> or against a railroad company which by reason of the negligent manner in which it constructed its road caused a large quantity of water to flow upon the land demised.<sup>37</sup> The owner of land may recover damages for the destruction by fire of the grass upon his land against a railroad company or any person to whose negligence the fire may be attributed. Such an injury will be presumed to be an injury to the reversion so that the owner may recover though there was a tenant in possession. A landlord may recover for fences and other structures destroyed by fire caused by negligence provided he can prove that the destruction of the fences, etc., was an injury to his reversion and diminished the rental value of the land. The market value of the labor and materials necessary to replace the fences or other structures with his loss of rent while they are being rebuilt or replaced measures his damages.<sup>38</sup> The same rules extend to the destruction of shade trees. The landlord may recover for the destruction or cutting down of shade trees occurring while a tenant was in possession. The consent of the tenant to the cutting is no defense to the trespasser. Possibly proof of it may be relevant to mitigate the landlord's damages. The measure of the damages is the market value of the trees as shade trees.<sup>39</sup> The following are examples of injuries to the reversion for which a landlord may recover damages though the premises are in possession of a lessee: Cutting and carrying away timber,<sup>40</sup> negligence in constructing a drain on adjacent land,<sup>41</sup> taking land by railroad or municipal corporation under right of eminent domain,<sup>42</sup> entry on premises and there breaking a blind and a pane of glass,<sup>43</sup> overflowing land,<sup>44</sup> diversion of water per-

<sup>36</sup> Parker v. Shackelford, 61 Mo. 68.

<sup>37</sup> Gulf, etc., Co. v. Harmonson (Tex. 1893), 22 S. W. Rep. 764.

<sup>38</sup> Wiggins v. St. Louis, M. & S. E. R. Co. (Mo. App.), 95 S. W. Rep. 311.

<sup>39</sup> Western Union Tel. Co. v. Smith, 64 Ohio St. 106, 59 N. E. Rep. 890. In an extreme case accompanied by circumstances of aggravation where the trespass and destruction were deliberate and intentional and with knowl-

edge of the landlord's rights exemplary damages would be given.

<sup>40</sup> Bulkley v. Dolbeare, 7 Conn. 232; Cramer v. Groseclose, 53 Mo. App. 648.

<sup>41</sup> Lachman v. Deisch, 71 Ill. 59.

<sup>42</sup> Parks v. City of Boston, 15 Pick. (Mass.) 198; Korn v. N. Y. El. R. Co., 60 Hun (N. Y.) 583, 15 N. Y. Supp. 10.

<sup>43</sup> Cushing v. Kenfield, 5 Allen (Mass.) 307.

<sup>44</sup> Davis v. Jewett, 13 N. H. 88.

manently from leased premises, a mill,<sup>45</sup> the erection of a fence on the premises by a stranger which will create an adverse possession in him,<sup>46</sup> fire permanently injuring sod,<sup>47</sup> removing a house from the land,<sup>48</sup> injuring a line fence and closing up a right of way.<sup>49</sup> Among other acts which are almost universally regarded as injurious to the reversion when they are committed by strangers during the occupation of premises by a tenant may be mentioned the setting up of a fence by a trespasser on the land by means of which a portion of the land is separated from the remainder,<sup>50</sup> or the removal of a fence previously erected by the landlord,<sup>51</sup> and, *a fortiori* the flooding of the leased land. These and similar acts whether they consist in taking away from or adding something to the land, have the one thing in common, that aside from any damage which they may occasion the tenant, they indicate an assertion of title upon the part of the person doing them and which may if not resisted by the landlord ripen into adverse possession and in course of time overturn and defeat the title of the landlord. If therefore the trespasses be such as will, if persisted in, ripen into adverse possession an immediate injury to the reversion will be presumed. If there be a tenant for life or years in actual possession, he can sue for any trespass affecting his immediate residential interest, and the reversioner or remainderman, if the act does a permanent injury to the inheritance, may sue as to that, but they are separate claims. Where the injury is of a permanent nature deteriorating the market value of the property, so that, if the remainderman or reversioner were to sell, it would bring less money in the market, there is damage to the reversion or remainder for which the reversioner or remainderman may sue; and where the same act affects both the limited estate and remaining fee, the damages are apportionable between the tenant of the particular estate and the owner of the fee; the particular tenant recovers for damages

<sup>45</sup> Halsey v. Lehigh Valley R. Co., 45 N. J. Law, 26.

<sup>46</sup> Lee v. Meeker, 2 Wis. 487.

<sup>47</sup> Arnsen v. Spawn, 2 S. D. 269, 49 N. W. Rep. 1096, 39 Am. St. Rep. 783; Barbee v. Shannon, 1 Ind. Ter. 199, 40 S. W. Rep. 584.

<sup>48</sup> Taylor v. Wright, 51 App. Div. 97, 64 N. Y. Supp. 344.

<sup>49</sup> Arnsen v. Spawn, 2 S. D. 269, 49 N. W. Rep. 1096. Missouri, K. & T. R. Co. v. Fulmore (Tex. 1894), 26 S. W. Rep. 238.

<sup>50</sup> Arnsen v. Spawn, 2 S. D. 269, 49 N. W. Rep. 1096.

<sup>51</sup> Lienow v. Ritchie, 8 Pick. (Mass.) 235.

only to his present enjoyment covering his entire term, if they affect his entire term, and the remainderman or reversioner only for damages to the remainder or reversion.<sup>52</sup> A landlord suing for an injury to his reversion must plead his reversionary interest in the premises, show its extent whether for years or in fee and must also allege that the reversionary interest was in fact injured.<sup>53</sup> It is not sufficient that a tortious act is pleaded which would of necessity constitute an injury to the reversion by reason of the permanent effect produced by it.<sup>54</sup> And the measure of the landlord's damages is the permanent diminution of the rental value of the premises.<sup>55</sup> Entry by a tenant is not necessary to the vesting of a term of years; but for the purpose of maintaining an action of trespass by the tenant he must enter since that action is based on actual possession.<sup>56</sup>

**§ 419. Landlord's remedy for diversion of natural water.** The reversioner may maintain an action against one who diverts a natural stream which runs through his land though the land is in the possession of a tenant. The diversion of a natural stream of water is clearly an injury to the reversion. Nor is it less injurious to the reversion because the possession and enjoyment of the tenant are diminished by the diversion. The flow of water over or through land is a continuous source of fertility and benefit particularly in a case where the natural stream overflows its banks at stated intervals and thus deposits soil and seed upon the lands contiguous to the stream. Whether the stream overflows or not, the current or flow of water naturally irrigates and moistens the ground to a considerable extent and thus stimulates vegetation. The growth and decay of this add, not only to the fertility but to the substance of the soil itself.

<sup>52</sup> *Jordan v. City of Benwood*, 42 W. Va. 312, 28 S. E. Rep. 266, 36 I. R. A. 579, 57 Am. St. Rep. 859, cited with approval in *Nashville, C. & St. L. Ry. Co. v. Heikens* (Tenn.), 79 S. W. Rep. 1038, 1041.

<sup>53</sup> Compare *Bobb v. Syennite Granite Co.*, 41 Mo. App. 642.

<sup>54</sup> *George v. Fisk*, 32 N. H. 32, 45; *Davis v. Jewett*, 13 N. H. 88, 91; *Jackson v. Pesked*, 1 M. & S. 284; *Took v. Glascock*, 1 Saund.

343, n. 4, 1 Chit. Pl. 329; *Baker v. Saunderson*, 3 Pick. (Mass.) 348. See, also, *Noyes v. Stillman*, 24 Conn. 15.

<sup>55</sup> *Lachman v. Deisch*, 7 Ill. 59, 60.

<sup>56</sup> *Harrison v. Blackburn*, 17 C. B. (N. S.) 678, 34 L. J. C. P. 109, 10 Jur. (N. S.) 1131, 11 L. T. 454, 13 W. R. 135; *Chatfield v. Parker*, 2 M. & Ry. 540, 8 B. & C. 543, 7 L. J. (O. S.) K. B. 13.

Hence without doubt the withdrawal of the water of a stream from the land results in a permanent diminution both of the fertility and materiality of the soil. So, it must be remembered that the water with the right to have it flow if such be its natural condition is identified with the soil not merely as an easement or incident but as an appurtenance to it. Hence the loss or deprivation of the flowage of water is an injury to the reversion for which damages may be recovered to the same extent as for any injury to the land or to the structures upon it which permanently diminishes the rental value.<sup>57</sup> A lessee of land on the banks of a stream has the same right as its owner in possession to prevent a threatened diversion of the water.<sup>58</sup> The landlord and not the tenant can recover damages for injuries to the value of farm land caused by the land being drained of surface and sub-surface waters by reason of the operation of pumps at pumping stations which were a part of a system of municipal water works, where the pumps had been installed and in operation several years before the lease was made.<sup>59</sup>

**§ 420. The right of the landlord to timber severed from the freehold.** The tenant during the term has an absolute right as against his landlord not only to the possession of the soil but to the possession of everything growing upon it so long as they remain a part of the soil. He may enjoy the protection and shade furnished by growing trees while they continue a part of the soil but the moment they are severed they become personal property the right to the immediate possession of which at once vests in the landlord. If the tenant upon the severance of the trees converts them to his own use the landlord may at once maintain trover or some similar action to recover their value. He may maintain this action during the tenancy and he is not required to show title to the land in order to do so. From the relationship of the parties there can be no inquiry into the ownership of the land for on general principles if it appear that the occupant is a tenant he cannot assert that his landlord had no title. Nor can

<sup>57</sup> *Lux v. Haggin*, 69 Cal. 390, 10 Pac. Rep. 674; *Heilbron v. Last Chance Water Co.*, 75 Cal. 117, 17 Pac. Rep. 65, 67, 68; *Cary v. Daniels*, 5 Met. (Mass.) 238; *Hart v. Evans*, 8 Pa. St. 14.

<sup>58</sup> *Crook v. Hewitt*, 4 Wash. 749, 31 Pac. Rep. 28.  
<sup>59</sup> *Sposato v. City of New York*, 75 App. Div. 304, affirmed, 178 N.Y. 583, 70 N. E. Rep. 1109.

the tenant defend upon his right of possession for that right relates exclusively to the land and to things attached to it and not to articles which have been severed from it with the consent of the landlord. These rules and principles are abundantly sustained by the authorities.<sup>60</sup>

**§ 421. The tenant's right to bring an action of trespass against a stranger.** Inasmuch as the right to bring an action of trespass, whether at common law or under a statute, is based upon the actual or constructive possession of the premises and arises from a disturbance of the possession it is well settled that a tenant in possession of demised premises upon which the trespass is committed, may maintain an action of trespass against a stranger who disturbs him in his possession. For the lessor, though he may maintain an action of trespass for an injury which is done to the reversion while the land is under lease to another person, cannot maintain such action against one whose sole wrongdoing is a disturbance of his tenant's use and occupation of the demised premises.<sup>61</sup> A tenant at will who is in actual

<sup>60</sup> *Street v. Nelson*, 80 Ala. 230; *Brooks v. Rogers*, 101 Ala. 111, 123; *Anderson v. Hapler*, 34 Ill. 436, 85 Am. Dec. 318; *Mather v. Trinity Church*, 3 S. & R. (Pa.) 509, 8 Am. Dec. 663, 668, 669; *Harlan v. Harlan*, 15 Pa. St. 507, 513; *Truss v. Old*, 6 Rand. (Va.) 556, 18 Am. Dec. 748, 751; *Moores v. Wait*, 3 Wend. (N. Y.) 104, 20 Am. Dec. 667; *Congregational Society v. Fleming*, 11 Iowa, 533, 79 Am. Dec. 511; *Farrand v. Thompson*, 5 Bar. & Ald. 826.

<sup>61</sup> *Uttendorfer v. Saegers*, 50 Cal. 496; *Tilghman v. Cruson*, 4 Har. (Del.) 341; *Gould v. Steenburg*, 4 Ill. App. 439; *Halligan v. Chicago, etc., Co.*, 15 Ill. 558; *Drake v. Chicago, etc., Co.*, 70 Iowa, 59, 64, 29 N. W. Rep. 804 (growing crops of tenant); *Walden v. Conn*, 84 Ky. 312, 314, 1 S. W. Rep. 557, 4 Am. St. Rep. 204; *Lyford v. Toothacker*, 39 Me. 28; *Bartlett v. Perkins*, 13 Me. 87, 90 (levy of

execution); *Hayward v. Sedgeley*, 14 Me. 439, 440, 31 Am. Dec. 643 (cutting of trees); *Kelly v. Waite*, 12 Met. (Mass.) 300; *Darling v. Kelly*, 113 Mass. 29; *Hersey v. Chapin*, 162 Mass. 176; *Bascom v. Dempsey*, 143 Mass. 409, 410, 9 N. E. Rep. 744; *Richards v. Gauffret*, 145 Mass. 486, 488, 14 N. E. Rep. 535; *Tyson v. Shueey*, 5 Md. 540; *Burt v. Warne*, 31 Mo. 296, 300; *Lindenbower v. Bentley*, 86 Mo. 515, 519; *Anderson v. Nesmith*, 7 N. H. 167, 168; *Wentworth v. Railroad Co.*, 55 N. H. 540, 545; *Holmes v. Seeley*, 19 Wend. (N. Y.) 507; *Wood v. City of Williamsburgh*, 46 Barb. (N. Y.) 601, 603; *Tobias v. Cohn*, 36 N. Y. 363, 364; *Tobey v. Webster*, 3 Johns. (N. Y.) 468; *Biglow v. Biglow*, 77 N. Y. Supp. 716; *Brooks v. Stinson*, 44 N. Car. 72, 73; *Smith v. Fortiscue*, 48 N. Car. 65, 66; *Reynolds v. Williams*, 1 Tex. 311; *Kretzer v. Wysong*, 5 Gratt. (Va.) 9; *Stoltz v. Kretsch-*

possession,<sup>62</sup> or an occupant of land under an agreement to work it on shares who has an exclusive right to the possession,<sup>63</sup> may avail himself of the remedy of trespass. But a tenant at sufferance, being himself a mere trespasser with no right to possession cannot maintain trespass against his landlord,<sup>64</sup> or against a person claiming title from the landlord.<sup>65</sup> The tenant and not the landlord is the proper party to bring an action against a corporation which in constructing and maintaining a railroad caused water to overflow on the premises at frequently recurring intervals to the damage of crops planted and owned by the tenant.<sup>66</sup> So, a tenant may while he is in possession recover a penalty for the obstruction of a way which is appurtenant to the premises under a statute which imposes a penalty for ob-

mar, 24 Wis. 283; Ganter v. Atkinson, 35 Wis. 48; 2 Co. Litt. 57a; Roll. Abr. Trespass, n. 4; Com. Dig. Trespass, B, 2; 3 Black. Com. 210; New Jersey, etc., Co. v. Van Syckle, 37 N. J. Law, 495; Campbell v. Arnold, 1 Johns. (N. Y.) 511; Tobey v. Webster, 3 Johns. (N. Y.) 468; Dale v. Southern Railway Co., 132 N. Car. 705, 44 S. E. Rep. 399; Smith v. Fortisue, 48 N. Car. 65; Torrence v. Irwin, 2 Yeates (Pa.) 210, 1 Am. Dec. 340; Greber v. Kleckner, 2 Pa. St. 289; Seeley v. Alden, 6 Pa. St. 352; Davis v. Clancy, 3 McCord (S. Car.) 422, 425; Cannon v. Hatcher, 1 Hill Law (S. Car.) 260, 26 Am. Dec. 177; Foley v. Wyerth, 79 Am. Dec. 771; St. Louis, I. M. & S. Ry. Co. v. Hall, 71 Ark. 302, 74 S. W. Rep. 293; Southern Ry. Co. v. Horine (Ky. 1904), 49 S. E. Rep. 285; Tilghman v. Cruson, 4 Har. (Del.) 341; Gould v. Sternberg, 4 Ill. App. 439; Louisville & N. R. Co. v. Smith, 143 Ala. 335, 37 So. Rep. 490; Lunt v. Brown, 13 Me. 236, 239; City of Clinton v. Franklin, 26 Ky. Law Rep. 1053, 83 S. W. Rep. 142; French v. Fuller, 23 Pick. (Mass.) 104; Lindenbower

v. Bentley, 86 Mo. 515; McDonnell v. Cambridge, 151 Mass. 159. An actual or a constructive possession by the tenant is indispensable before he can maintain trespass either against his landlord or against a stranger. Bartlett v. Perkins, 13 Me. 87; Holmes v. Seeley, 19 Wend. (N. Y.) 507; Davis v. Young, 20 Ala. 151. See Townley v. Oregon Ry. Co., 33 Oreg. 333, 54 Pac. Rep. 150. Possession in the plaintiff must be pleaded or the action cannot be maintained as an action for a trespass. To allege that the plaintiff is a lessee or a landlord is not enough. Alt v. Gray, 67 N. Y. Supp. 411.

<sup>62</sup> Hayward v. Sedgeley, 14 Me. 439, 31 Am. Dec. 64.

<sup>63</sup> Warner v. Abbey, 112 Mass. 355.

<sup>64</sup> Wilde v. Cantillon, 1 Johns. Cas. (N. Y.) 123; Hyatt v. Wood, 4 Johns. 150, 4 Am. Dec. 258.

<sup>65</sup> Esty v. Baker, 50 Me. 325, 79 Am. Dec. 616.

<sup>66</sup> Baltimore & S. P. R. Co. v. Hackett, 87 Md. 224, 39 Atl. Rep. 510; St. Louis A. & T. Co. v. Trigg, 63 Ark. 536, 40 S. W. Rep. 579.

structing a way though the obstruction had been placed in the way before the commencement of the tenant's term.<sup>67</sup> A grant of the right to operate for oil is not a lease conferring the possession of the land nor is it a sale of the oil. The lessee therefore neither owns nor has possession of the oil which underlies the land until he has actually produced the oil by pumping through wells drilled or to be drilled by him. The lessee therefore, not having possession of the land or of the oil while it continues to be a part of the land cannot maintain a technical action of trespass against one who as lessee of his lessor, is drilling wells on the land by which the flow of oil in his wells is materially diminished. But where a statute has abolished the common law distinction between trespass and trespass on the case he may recover as under the latter form of action though he claims a trespass in his complaint.<sup>68</sup> In the absence of an express covenant, a landlord is not liable for the acts of third persons who, as trespassers or wrongdoers and without the consent or direction of the landlord disturb a tenant in possession in the quiet enjoyment or possession of the premises or prevent him from entering on the premises. For such injuries the law gives the tenant an adequate remedy against the intruder. The implied covenant of quiet enjoyment is applicable only to the acts of the landlord himself, or to the acts of some person claiming under him or under title paramount to his.<sup>69</sup> The tenant may even after the termination of the lease and his surrender of possession maintain trespass *quare clausum fregit* against his landlord or any other person for an injury to his crops which he has not yet removed from the demised premises. He still has such an interest in and right to enter upon that portion of the land on which the crops are growing as will enable him to maintain such action. Hence, where the landlord or any other person permits cattle to trample down or consume the crops, or where an intruder reaps or destroys the crops, the tenant whose property they are may maintain trespass *quare clausum fregit*.<sup>70</sup> Thus, for example, a lessor cannot maintain trespass

<sup>67</sup> Morrison v. Chicago & N. W. Ry. Co., 117 Iowa, 587, 91 N. W. Rep. 793.

<sup>68</sup> Duffield v. Rosensweig, 144 Pa. St. 520, 23 Atl. Rep. 4.

<sup>69</sup> Abrams v. Watson, 59 Ala. 524, 529.

<sup>70</sup> Forsythe v. Price, 8 Watts (Pa.) 282, 34 Am. Dec. 465, 467; Stultz v. Dickey, 5 Binn. (Pa.)

against one who entering on the premises builds a fence thereon to the inconvenience of the lessee only,<sup>71</sup> or against one who throws down a fence built by the tenant,<sup>72</sup> or who diverts water used solely by the tenant,<sup>73</sup> or obstructs the tenant's access to the premises.<sup>74</sup>

**§ 422. Right of lessor at will to maintain trespass.** Though the authorities are not altogether harmonious, there are many cases which hold that a lessor at will cannot maintain trespass

285, 292, 6 Am. Dec. 411; *Biggs v. Brown*, 2 S. & R. (Pa.) 14, 18; *Arnold v. Skale, Noy*, 149; 2 *Rolles*, Abr. 568, l. 15; Com. Dig. tit. *Trespass (C) 1*; *Bacon's Abr. tit. Trespass*, 591. The tenant may elect between trespass and an action upon the case. *Stultz v. Dickey*, 5 *Binn. (Pa.)* 285, 292; *Co. Litt. 56*. A landlord cannot recover for an injury to the growing crops of his tenant (*Drake v. Chicago, etc., Co.*, 70 *Wis.* 59, 29 *N. W. Rep.* 804; *Stoltz v. Kretschmar*, 24 *Wis.* 283, 285; nor against a trespasser who, having intruded upon the demised premises, builds a fence thereon to the injury of the tenant alone. *Walden v. Conn.*, 84 *Ky.* 312, 1 *S. W. Rep.* 537, 4 *Am. St. Rep.* 204. But the owner of a farm may maintain trespass against a person who removes the crops from the farm where the lease provided that the produce of the farm should be consumed upon it and remain the property of the lessor until a certain event took place. *Gray v. Stevens*, 28 *Vt.* 1. But an owner of unoccupied land, it has been held, may maintain trespass though he has put a person in occupation of the land as his tenant merely to keep off trespassers and such person cultivates a portion of the land. *Davis v. Clancey*, 3 *McCord (S. Car.) Law*, 422, 424.

<sup>71</sup> *Walden v. Conn.* 84 *Ky.* 312, 1 *S. W. Rep.* 537, 4 *Am. St. Rep.* 204.

<sup>72</sup> *Little v. Pallister*, 3 *Me.* 6, 15.

<sup>73</sup> *Moody v. King*, 74 *Me.* 497, 498.

<sup>74</sup> *Van Siclen v. City of New York*, 64 *App. Div.* 437, 72 *N. Y. Supp.* 209, modifying 32 *Misc. Rep.* 403, 66 *N. Y. Supp.* 555. "It is a well settled rule that when a contract of tenancy is consummated by the entry of the tenant the exclusive right of possession is thereby instantly changed from the landlord to the tenant during his term, and for any injury to that possession, the right of action is exclusively in him. This is so whether he retains the possession or not, because it is his exclusive right of possession that gives him the exclusive right of action for any injury done to it, either by the landlord or a stranger, during the existence of that exclusive right. During the continuance of the tenant's right of possession, the landlord has no right of action for an injury done to it by a stranger or by the tenant himself. His right is confined to the protection of his reversionary interest merely. For any injury to his reversionary interest, either by his tenant or a stranger, he may have an appropriate ac-

against one who merely disturbs the possession of his tenant at will.<sup>75</sup> Some cases hold, however, that the lessor as well as the lessee in the case of a tenancy at will may maintain trespass under such circumstances.<sup>76</sup> These authorities proceed upon the theory that inasmuch as the estate at will may be determined at any moment and that the trespass is an injury which destroys the term as against the lessor the close broken is the close of the lessor and not merely that of the lessee and that therefore the lessor may maintain trespass as though the injury was to the freehold.<sup>77</sup> So, in all cases where the act of trespass though committed while the land is in the possession of a tenant at will, results in an injury to the reversion of the landlord as where buildings on the land are destroyed or trees or minerals removed by the trespasser, the lessor has, as in ordinary cases of a tenancy for years, an action of trespass *quare clausum fregit* or an action of trespass on the case for the injury to the freehold while the lessee has the same remedy for the injury to his enjoyment and possession.<sup>78</sup> A tenant in possession may maintain trespass *quare clausum fregit* against his landlord or any person claiming under the landlord for an intrusion during the term upon the premises without the consent of the tenant to the same extent as he may maintain such an action against a stranger.<sup>79</sup> A tenant at will whose lease has not terminated and

tion of redress, but not an action of trespass, because that action lies alone for an immediate and direct injury to the possession, and the tenant having the exclusive right to the possession, he alone can resort to that kind of action." By the court in *Walden v. Conn.*, 84 Ky. 312, on p. 314.

<sup>75</sup> *Little v. Pallister*, 3 Me. 6; *Schenk v. Mundorf*, 2 Brown (Pa.) 106; *Gunsolus v. Larmer*, 54 Wis. 630, 633, 12 N. W. Rep. 62.

<sup>76</sup> *Shaw v. Cummiskey*, 7 Pick. (Mass.) 576; *O'Brien v. Cavanaugh*, 61 Mich. 368, 28 N. W. Rep. 127; *Noyes v. Stillman*, 24 Conn. 15.

<sup>77</sup> *Starr v. Jackson*, 11 Mass. 519.

<sup>78</sup> *Smith v. Fortiscue*, 48 N. Car.

65, 66; 2 Rolle, Abr. 551; 7 Com. Dig. "Trespass," B, 2; 1 Saunders, 322a, n. 5.

<sup>79</sup> *Abrams v. Watson*, 59 Ala. 524; *Teagarden v. McLaughlin*, 86 Ind. 476, 44 Am. Rep. 332; *Blake v. Coats*, 3 G. Greene (Iowa) 548; *Mengelle v. Abadie*, 48 La. Ann. 669, 10 So. Rep. 670; *State ex rel. Jennings-Heywood Oil Syndicate v. DeBaillon*, 113 La. Ann. 572, 37 So. Rep. 481; *Cunningham v. Holton*, 55 Me. 33; *Marden v. Jordan*, 65 Me. 9; *Bryant v. Sparrow*, 62 Me. 546; *Dickinson v. Goodspeed*, 8 Cush. (Mass.) 119; *Van Warden v. Winslow*, 117 Mich. 564, 76 N. W. Rep. 87; *Shannon v. Burr*, 1 Hilt. (N. Y.) 39; *Barneycastle v. Walker*, 92 N. Car. 198; *Wilber v.*

who is in possession may maintain an action of trespass against his lessor.<sup>80</sup> The same rule applies between a lessor and a tenant working land on shares, when the latter is to have exclusive control of the land.<sup>81</sup> The rules of law regulating the subject of trespass in general are applicable to the case of a trespass by the landlord upon the demised premises during the term. The landlord may be held liable though he was not personally a trespasser and though he derived no benefit from the trespass if he, as a master or a principal, directed an actual trespass by his servant or his agent.<sup>82</sup> Indeed both the landlord who directs and his servant who commits a trespass upon the premises of the tenant may be sued jointly or severally for the same.<sup>83</sup> So, a landlord may render himself liable to his tenant for a trespass committed in his name though without his knowledge if, after the matter has been brought to his knowledge, he acquiesces therein and accepts and enjoys the fruits of the trespass.<sup>84</sup> It must be shown, however, that the landlord assented and accepted with a full knowledge of the facts of the trespass.<sup>85</sup> In one case it has been held that in an action of trespass by the tenant against the landlord, actual compensatory damages only are recoverable and the motive of the landlord in trespassing is immaterial.<sup>86</sup> Elsewhere it is the law that exem-

Paine, 1 Ohio, 251; Phelps v. Randolph, 147 Ill. 335, 35 N. E. Rep. 243, affirming 45 Ill. App. 492; Maney v. Lamphere, 11 Detroit Leg. N. 872, 102 N. W. Rep. 974. In Entelman v. Hapgood, 95 Ga. 390, 22 S. E. Rep. 545, it was held that a landlord might be liable for a trespass for an entry made by him after the tenant is holding over and in arrears for rent. This, however, is not a general rule.

<sup>80</sup> Dickinson v. Goodspeed, 8 Cush. (Mass.) 119; Cunningham v. Horton, 57 Me. 420.

<sup>81</sup> Blake v. Coats, 3 G. Greene (Iowa) 548; Warner v. Abbey, 112 Mass. 345.

<sup>82</sup> Woodbridge v. Conner, 49 Me. 353, 77 Am. Dec. 263; McNeeley

v. Hunter, 30 Mo. 332; Coats v. Darby, 2 N. Y. 517.

<sup>83</sup> Lightner v. Brooks, 15 Fed. Cases, 8,344, 2 Clif. C. C. 287.

<sup>84</sup> Vose v. Baker, 1 Cranch C. C. 104; Grund v. Van Vleck, 69 Ill. 478; Prince v. Flynn, 2 Litt. (Ky.) 40. Trespass may be maintained against one who carries away material of a building demolished by a trespasser, though not himself a trespasser. Woodruff v. Halsey, 8 Pick. (Mass.) 333, 19 Am. Dec. 329; Barrett v. Warren, 3 Hill (N. Y.) 348.

<sup>85</sup> Fox v. Jackson, 8 Barb. (N. Y.) 355; Brooks v. Olmstead, 17 Pa. St. 24; Binds v. Benbow, 11 Rich. L. (S. C.) 24.

<sup>86</sup> Moyer v. Gordon, 113 Ind. 282, 14 N. E. Rep. 476.

plary or punitive damages may be awarded the tenant where the trespass is of an aggravated character and accompanied by violence or other circumstances showing an evil intention on the part of the landlord.<sup>87</sup>

**§ 423. The delivery of the possession of a part of the premises.** A tenant is not bound to accept the possession of a portion of the demised premises upon the date when he should have full possession in case the portion upon which he may enter is practically worthless to him.<sup>88</sup> The mere acceptance of the lease does not render the tenant liable for rent of the premises for the time he is thus deprived of possession of a part. But when the date for his entry into possession arrives, it is his duty, if the landlord is unable or refuses to give him possession of all the premises either at once to notify the landlord of his intention to cancel and terminate the lease or to enter upon the portion of the premises open to him and to seek his remedy in a counterclaim in an action for the rent or in an independent action for damages against his landlord.<sup>89</sup> If the lessee at the beginning of the term obtains and uses only a part of the premises without assenting to the withholding of the residue by the lessor, the latter can only recover rent for the part received.<sup>90</sup> But it has also been held that a landlord who does not give his tenant possession of all the premises cannot apportion the rent and distrain for the rent of that portion which the tenant actually occupies.<sup>91</sup> It is competent for the lessee to waive his rights to have the full occupation of the whole premises by consenting to occupy a part and by permitting the lessor to occupy the balance. The lessee by voluntarily permitting the lessor to occupy a portion of the premises after his own entry under the lease is estopped to urge that as a defense to an action for the rent. But where the lessor or another and prior lessee in

<sup>87</sup> *Shares v. Brooks*, 81 Ga. 468, 8 S. E. Rep. 429; *Loftus v. Maxey*, 73 Tex. 242, 11 S. W. Rep. 272.

<sup>88</sup> *O'Brien v. Smith*, 59 Hun, 624, 13 N. Y. Supp. 408.

<sup>89</sup> *O'Brien v. Smith*, 59 Hun, 624, 13 N. Y. Supp. 408; *Smith v. Barber*, 89 N. Y. Supp. 317, 96 App. Div. 236. The tenant who enters upon a portion of the premises

cannot refuse to pay rent for the whole but must procure redress by a counterclaim in an action brought by the landlord against him for the rent, or by an action for damages for a breach of the covenant of quiet enjoyment.

<sup>90</sup> *Prior v. Kiso*, 81 Mo. 241, 253.

<sup>91</sup> *Hatfield v. Fullerton*, 24 Ill. 278; *Knox v. Hexter*, 71 N. Y. 461.

partial possession refuses to vacate upon the request of the lessee, the latter may abandon the lease and quit the part of the premises occupied by him without liability for the rent.<sup>92</sup>

**§ 424. Placing "to let" signs upon the premises.** The right of the tenant to the full, uninterrupted and complete enjoyment and possession of the premises during the term may be infringed by the action of the landlord in placing a "to let" sign upon the demised premises. If the tenant is not in arrears for rent, or the landlord has no other reason to terminate the lease, the placing of a "to let" sign upon the demised premises may perhaps be regarded as an eviction of the tenant. In any case the entry of the landlord without the tenant's consent for the purpose of hanging or placing a "to let" sign is a trespass. Under such circumstances, and if the tenant is no wise at fault, he may remove the "to let" sign providing he uses ordinary care in doing so and commits no trespass. Frequently the right of a landlord to put up a "to let" sign during a certain period before the lease shall have expired is expressly given him by the lease. In the absence of any agreement to this effect, a landlord would be justified only after the tenant is in arrears for rent, or has given notice to quit, in placing a "to let" sign in a conspicuous place on the premises.<sup>93</sup> It has been held that a covenant permitting a lessor to show the premises and permitting him to place the usual notice of "to let" on the premises which should remain there without molestation, enables the lessor to place at least two "to let" signs upon the premises for a reasonable time before the expiration of the lease.<sup>94</sup>

<sup>92</sup> Reed v. Reynolds, 37 Conn. 469. Where the lessee accepts a part of the premises, to all of which he is entitled, it is for the jury to determine whether his action was a waiver of the full performance of the contract. Prior v. Kiso, 81 Mo. 24.

<sup>93</sup> Whipple v. Gorsuch (Ark. 1907), 101 S. W. Rep. 735.

<sup>94</sup> United States Trust Co. of New York v. O'Brien, 143 N. Y. 284, page 289. In referring to covenants in a lease to the effect that at all reasonable hours in the day

time the lessee would permit the lessor to show the premises and that he would permit the usual notice of "To let" to be posted on the premises and to remain there without molestation, the court in United States Trust Co. of New York v. O'Brien, 143 N. Y. 284, on page 289, said: "Regarding the purpose for which these covenants in the lease were inserted, it is obvious that two of them could have been placed there to facilitate and aid the lessor in his efforts to obtain another tenant at

**§ 425. The evidence and the pleading.** The tenant who seeks to recover damages from his landlord for the latter's failure to give him possession need not allege or prove that he offered to pay the rent,<sup>95</sup> or that he demanded a lease,<sup>96</sup> or that he demanded upon the land that he be put in the possession.<sup>97</sup> Allegations of a lease between the parties, of the mode of paying and of the amount of the rent, and the breach, in that the lessor refused to give the possession of the land, are good on demurrer.<sup>98</sup>

**§ 426. The measure of the tenant's damages for a failure by the landlord to deliver possession.** Where the lessor is liable at all for the inability of the lessee to obtain the possession, he will be accountable for the rent paid in advance by the lessee with interest from the date of payment. And where the lessor knew when he executed the lease that his own right to possession was so defective that in all probability he would not be able to deliver the possession at the beginning of the term, the lessor will be liable to pay all damages which may fairly and reasonably be considered as arising naturally from the breach, or which may reasonably be supposed to have been in the contemplation of both parties as the probable result of the breach.<sup>99</sup> If the special circumstances under which the contract of lease was made were known to both parties, such circumstances may be taken into consideration as conclusively establishing the measure of damages. If the special circumstances were not known to the party breaking the contract, the damages will be such in amount as would arise generally in the great multitude of cases which are not affected by special circumstances. Thus, if the lessor did not know the purpose for which the premises were leased, the measure of the lessee's damages in addition to the rent if any, paid in advance, and expense the lessee has been put to in preparing to occupy the store is the difference be-

the expiration of the lease with the least possible delay."

<sup>95</sup> *Berrington v. Casey*, 78 Ill. 317.

<sup>96</sup> *Driggs v. Dwight*, 17 Wend. (N. Y.) 71, 31 Am. Dec. 283.

<sup>97</sup> *Carroll v. Peake*, 1 Peters (U. S.) 18, 7 Law. ed. 34.

<sup>98</sup> *Avan v. Frey*, 69 Ind. 91.

General averments by the tenant of his readiness to go into possession on the proper day and a request for possession are sufficient. *Carroll v. Peake*, 1 Pet. (U. S.) 18, 7 Law. ed. 34.

<sup>99</sup> *Gross v. Herkert*, 124 Wis. 314, 97 N. W. Rep. 952.

tween the rent reserved or agreed to be paid in the lease and the actual rental value of the premises without regard to the purpose of their use by the tenant.<sup>1</sup> If the landlord knows when he makes the lease that the prospective tenant is carrying on a business elsewhere and that he is hiring the demised premises for that purpose, and if by reasonable diligence the tenant might have procured other premises reasonably well adapted to his business purposes, so that he could have retained substantially the good-will of his business, the rule of damages will be the same as in the case and under the circumstances above mentioned where the landlord did not know the purpose for which the store was to be used. If the tenant could obtain another store of the same character for the same rent or less rent than he was to pay under the lease, he can recover no general damages. If, however, the expense of moving to another store would have been greater than it would have been to move into the demised premises, he may recover for the excess as special damages. The inability of the tenant to obtain suitable premises for his business after a reasonable attempt by him to do so renders the landlord liable for all injury to his business where, with the knowledge of the intention of the tenant to use the premises for a particular commercial purpose, he is unable to give the tenant possession. The damages resulting to the tenant's business are then presumed to have been in the contemplation of the parties to the lease and may be recovered, though, under such circumstances, the difference between the rental

<sup>1</sup> *Tyson v. Chestnut*, 118 Ala. 387, 24 So. Rep. 73; *Snodgrass v. Chestnut*, 105 Ala. 149, 16 So. Rep. 723; *Snodgrass v. Reynolds*, 79 Ala. 452, 58 Am. Rep. 601; *Rose v. Wynn*, 42 Ark. 42; *Andrews v. Minter* (Ark.), 88 S. W. Rep. 822; *Cohn v. Norton*, 57 Conn. 480, 18 Atl. Rep. 595, 5 L. R. A. 572; *Joseph Barnhard & Son v. Curtis* (Conn. 1903), 54 Atl. Rep. 213; *Kenny v. Collier*, 79 Ga. 743, 8 S. E. Rep. 58; *Cilley v. Hawkins*, 48 Ill. 308; *Birch v. Ward*, 111 Ill. App. 336; *Greene v. Williams*, 45 Ill. 206; *Williams v. Oliphant*, 3 Ind.

271; *Hughes v. Hood*, 50 Mo. 350; *Giles v. O'Toole*, 4 Barb. 261; *Trull v. Granger*, 8 N. Y. 115; *Price v. Eisen*, 31 Misc. Rep. 457, 64 N. Y. Supp. 405; *Belding Bros. Co. v. Blum*, 88 N. Y. Supp. 178; *Rosenblum v. Riley*, 84 N. Y. Supp. 884; *Eastman v. City of New York*, 152 N. Y. 468, 46 N. E. Rep. 841, 34 N. Y. Supp. 1136; *Newbrough v. Walker*, 8 Grat. (Va.) 16, 56 Am. Dec. 127; *Robrecht v. Marling's Adm'r*, 29 W. Va. 765, 2 S. E. Rep. 827; *Gross v. Heckert*, 120 Wis. 314, 97 N. W. Rep. 952.

value of the premises and the rent under the lease cannot be included as an element of the damages.<sup>2</sup> The tenant may recover as special damages any expenses he may have been put to which were the natural, direct and necessary consequences of the landlord's conduct.<sup>3</sup> He may recover all damages which may be estimated according to fixed and reliable data but not those which are prospective or speculative in their nature. Only such damages are recoverable as are presumed to have been in the minds of the parties when making the lease. In the case of business property, the tenant cannot recover for any outlay by him after he was notified of the fact that another person was in possession with the landlord's permission. He may, however, recover all damages sustained by him due to all proper acts on his part in preparing to take possession of the store.<sup>4</sup> As elements of damage resulting from a breach of a contract to give possession, the lessee may prove that he sold his real and personal property, and that he was therefore without a house and was compelled to board by reason of which he lost his time and was caused serious trouble and inconvenience.<sup>5</sup> Hence, the ten-

<sup>2</sup> Cohn v. Norton, 57 Conn. 480, 491, 18 Atl. Rep. 595, 5 L. R. A. 572; Hodges v. Fries, 34 Fla. 63, 15 So. Rep. 682. See, also, Poposkey v. Munkwitz, 68 Wis. 322, 332-335, 32 N. W. Rep. 35, 60 Am. Rep. 858, and Hadley v. Baxendale, 9 Ex. 341; 26 Eng. L. & Eq. 398, where the subject is further discussed.

<sup>3</sup> Rose v. Wynn, 42 Ark. 257; Hodges v. Fries, 34 Fla. 63, 15 So. Rep. 682; Greene v. Williams, 45 Ill. 206.

<sup>4</sup> Joseph Bernhard & Son v. Curtis (Conn. 1903), 54 Atl. Rep. 213; Williamson v. Stevens, 82 N. Y. Supp. 1047.

<sup>5</sup> Yeager v. Weaver, 64 Pa. St. 425. The tenant can recover the rent he has paid in advance, and all the expenses of preparing to move on the premises. Adair v. Bogle, 20 Iowa, 238, 245; Hall v.

Horton, 79 Iowa, 352, 44 N. W. Rep. 569; Williams v. Oliphant, 3 Ind. 271; Cilley v. Hawkins, 48 Ill. 308; Driggs v. Dwight, 17 Wend. (N. Y.) 71; Giles v. O'Toole, 4 Barb. (N. Y.) 261, 263; Deloise v. Long Island R. Co., 66 N. E. Rep. 1106, affirming 65 App. Div. 487. But he cannot recover for the expenses of hiring extra clerks or for losses incurred in purchasing goods to be sold on the demised premises. Cohn v. Norton, 57 Conn. 480, 493, 18 Atl. Rep. 895, 5 L. R. A. 572. A loss occasioned by his buying perishable goods to be used in the carrying on of a business on the demised premises shortly before the commencement of the term is no legitimate part of his damages where there was a market for such goods in the city and he would not have suffered any injury had he put off

ant cannot generally recover for anticipated profits to be made in the demised premises.<sup>6</sup> It has been held, however, that where the landlord knows that the tenant has an established business and that he intends to carry such business on in the demised premises, the tenant can recover prospective profits if they are not too remote and conjectural and which can be ascertained with reasonable certainty.<sup>7</sup> In the case of a failure of the lessor to promptly deliver possession of farm lands leased, a different rule has been laid down in some of the cases. The measure of damages in these cases has been said to be what the lessee could have made by cultivating the land.<sup>8</sup> The lessee will be entitled to recover as damages the reasonable market value of what he would reasonably be expected to have raised during the year, less the amount he has earned or could have earned by reasonable diligence after the breach of the contract.<sup>9</sup>

buying until the beginning of the term. *Friedland v. Myers*, 139 N.Y. 432, 34 N. E. Rep. 1055.

<sup>6</sup> *Hodges v. Fries*, 34 Fla. 63, 15 So. Rep. 682; *Greene v. Williams*, 45 Ill. 206; *Smith v. Phillips* (Ky. 1895), 29 S. W. Rep. 358; *Taylor v. Cooper*, 104 Mich. 72, 62 N. W. Rep. 157; *Lawrence v. Wardwell*, 6 Barb. (N. Y.) 623; *Robrecht v. Marling's Adm'r*, 29 W. Va. 765, 2 S. E. Rep. 827.

<sup>7</sup> *Poposkey v. Munkwitz*, 68 Wis. 322, 335. A tenant who has agreed to take a lease of premises to carry on a particular trade, which purpose the landlord knows is entitled in addition to specific performance, to damages for the loss of profits as a consequence of the wilful refusal of the landlord to grant possession. *Jaques v. Millar*, 47 L. J. Ch. 544, 6 Ch. D. 153, 37 L. T. 151, 25 W. R. 846.

<sup>8</sup> *Shoemaker v. Crawford*, 82 Mo. App. 487, holding also that evidence of the quantity of grain the premises produced during the term in the hands of another ten-

ant is relevant, on the question of damages.

<sup>9</sup> *Rogers v. McGuffey* (Tex.), 74 S. W. Rep. 753. But compare *Taylor v. Cooper*, 104 Mich. 72, 62 N. W. Rep. 157, excluding proof of value of future crops in trespass. The lessee in *Gross v. Herkert*, 120 Wis. 314, leased premises in which he intended to carry on the saloon business from the date of the commencement of the term as fixed in the lease. The lessor knew of this purpose of the lessee when he signed the lease. In determining the measure of damages in an action brought to recover for the failure of the lessor to deliver possession at the commencement of the term, the court held the lessor liable for the difference between the price which the lessee had been compelled to pay for saloon fixtures, gas and electric fixtures and glassware purchased by him before the beginning of the term and the market price thereof at the time of the breach; and also for the excess in value of the term, if any,

**§ 427. The covenant of quiet enjoyment, when implied.** It is immaterial in all cases whether or not a lease contains an express covenant of quiet enjoyment so far as the rights of the tenant are concerned. For a covenant of quiet enjoyment is implied in every lease for a term by whatever form of words the lease is created. In other words, from the fact of the letting together with the entry by the tenant into possession with the consent of the lessor, it will be implied or presumed, not only that the landlord had a right to lease, but that he covenanted to secure the lessee against eviction by a paramount title, as well as against his own acts which would destroy the beneficial enjoyment which the lessee expects to have of the demised premises.<sup>10</sup> So, where a lease is made by parol, an implied covenant

over the contract price. But the amount which the lessee paid to a person of whom he had purchased liquors in anticipation of opening the saloon to release him from his contract to take the liquors, or which he had paid in advance to a person whom he had employed to work in the saloon to be repaid by that person in services, is no part of the damages for which the lessor is liable. In determining the value of the use of the premises it may be shown how much a prior occupant of the premises made per year while conducting a saloon there, though evidence that such prior occupant made a profit of \$2,000 per year is not alone sufficient to show that the value of the use of the premises was more than \$900.

<sup>10</sup> Abrams v. Watson, 59 Ala. 524, 529; Pickett v. Ferguson, 45 Ark. 177, 199; Field v. Herrick, 10 Ill. App. 591; Wade v. Halligan, 16 Ill. 507, 511; Avery v. Dougherty, 102 Ind. 443, 447, 2 N. E. Rep. 123, 52 Am. Rep. 680; Coleman v. Haight, 14 La. Ann. 564; Kaiser v. New Orleans, 17 La. Ann. 178; Pacific Express Co. v.

Haven, 6 So. Rep. 650, 41 La. Ann. 811; Baugher v. Wilkins, 16 Md. 25, 77 Am. Dec. 179; Dexter v. Manley, 4 Cush. (Mass.) 14, 24; Duncklee v. Webber, 151 Mass. 408, 411, 24 N. E. Rep. 1082; Kitchen Bros. Hotel Co. v. Philbin, 2 Neb. (Unof.) 340, 96 N. W. Rep. 487; The Mayor, etc., of New York v. Mable, 13 N. Y. 151, 154; York v. Steward, 21 Mont. 515, 55 Pac. Rep. 29; Barney v. Keith, 4 Wend. (N. Y.) 502; Edwards v. Perkins, 7 Oreg. 149; Schuylkill, etc., Co. v. Schmoele, 57 Pa. St. 271; Ross v. Dysart, 33 Pa. St. 452, 454; Steel v. Frick, 56 Pa. St. 172, 174; Maxwell v. Urban, 22 Tex. Civ. App. 565, 55 S. W. Rep. 1124; Knapp v. Marlboro, 29 Vt. 282; Shaft v. Carey, 107 Wis. 273, 83 N. W. 28; Eldred v. Leahy, 31 Wis. 546, 551; Owens v. Wight, 18 Fed. Rep. 865, 5 McCrary, 642; Budd-Scott v. Daniel, 71 Law J. K. B. 706, (1902) 2 K. B. 351, 87 Law. T. 392, 51 Wkly. Rep. 134; Wood, L. & T. 564; Taylor, L. & T. 304; 2 Platt, Leases, 9. Compare Gano v. Vandever, 34 N. J. Law, 293, 294; Lovering v. Lovering, 13 N. H. 513.

is raised which is identical in its effect with the implied covenant that exists where the lease is in writing.<sup>11</sup> So, it is usually said that the covenant of quiet enjoyment is a presumption arising from the use of the words "lease" or "demise,"<sup>12</sup> or of some other words having an equivalent meaning. This covenant of quiet enjoyment will be implied not only in a lease of corporeal property but also in a lease of an incorporeal right as in the case of a lease of a right to collect wharfage.<sup>13</sup> So, too, the fact that the rent is to be paid in a share of the crops does not deprive an agreement of its character as a lease and a covenant for quiet enjoyment will be implied.<sup>14</sup> The covenant for quiet enjoyment which is implied from the word "demise" is always qualified and restrained and may be superseded by an express covenant either for a good title or for quiet enjoyment. Hence, in construing a lease in the case of an eviction it will be necessary first to search for an express covenant for quiet enjoyment and it is only when this is absent from the lease that the implied covenant will arise.<sup>15</sup>

<sup>11</sup> *Hart v. Windsor*, 12 M. & W. 85; *Coe v. Clay*, 5 Bing. 440; *Bandy v. Cartwright*, 8 Exch. 933; *Messent v. Reynolds*, 3 B. & C. 201.

<sup>12</sup> *Wilkinson v. Clauson*, 29 Minn. 91, 93, 12 N. W. Rep. 147; *Hamilton v. Wright's Adm'r*, 28 Mo. 199; *Crouch v. Fowle*, 9 N. H. 219, 32 Am. Dec. 250; *Farney v. Keith*, 4 Wend. (N. Y.) 502.

<sup>13</sup> *The Mayor, etc., of New York v. Mabie*, 13 N. Y. 151, 154, citing and following *Seddon v. Senate*, 13 East, 63.

<sup>14</sup> *Steel v. Frick*, 56 Pa. St. 173. The implied covenant protects the lessee only during the existence of the term. *Brookhaven v. Baggett*, 61 Wis. 383. In some states, by statute, it is provided that "no covenant shall be implied in any conveyance of real estate, whether such conveyance contains special covenants or not." This provision does not extend to leases for a lease is merely a conveyance of a

chattel interest and not a conveyance of real estate as these words are employed in the statute. *Tone v. Brace*, 11 Paige (N. Y.) 566; *Lynch v. Onondaga Salt Co.*, 64 Barb. (N. Y.) 558; *Conley v. Schiller*, 24 N. Y. Supp. 473; *Edwards v. Perkins*, 7 Oreg. 149, 155. By the New York statute real estate is expressly defined as embracing only lands, tenements and hereditaments and chattels real, except leases for a term not exceeding three years. This definition is held to exclude leases for years, as such terms are not tenements or hereditaments. They are personal property going to the executor. *The Mayor, etc., v. Mabie*, 13 N. Y. 152, 159, overruling *Kinney v. Watts*, 14 Wend. (N. Y.) 38.

<sup>15</sup> *Line v. Stephenson*, 6 Scott, 447, 4 Bing. (N. C.) 678, 5 Bing. (N. C.) 183, 7 Scott, 69, 1 Arn. 385, 7 L. J. C. P. 263; *Stannard v. Forbes*, 6 A. & E. 572, 1 N. & P.

**§ 428. What constitutes a breach of the covenant of quiet enjoyment.** It is not every entry by a landlord or by a person claiming under a landlord that constitutes a breach of the covenant of quiet enjoyment. The covenant is meant to secure the lessee against a lawful interruption of possession by the lessor and not against a trespass by him or by a stranger claiming under him. Hence a mere entry by the landlord or his agent without any claim of paramount title is no breach of the covenant of quiet enjoyment though in such case the lessee has his remedy in an action of trespass *quare clausum fregit* against his lessor.<sup>16</sup> In order to constitute a breach of the covenant of quiet enjoyment there must be something done by the landlord of a grave and permanent character with an intention of permanently depriving the tenant of his enjoyment of the premises.<sup>17</sup> A breach of covenant for quiet enjoyment does not occur where there is merely a temporary inconvenience caused by the interference of the lessor with the access of his tenant to the demised premises.<sup>18</sup> Many of the cases hold that in order to prove a breach of a covenant of quiet enjoyment the lessee must show an actual or constructive eviction from the demised premises by one claiming a paramount title.<sup>19</sup> Hence, proof that an action of ejectment has been begun against the lessee is not alone a sufficient eviction where it does not also appear that he was actually ousted.<sup>20</sup> The entry of the lessor upon the premises and his doing while there such acts as constitute an actual eviction of the lessee from the whole or any portion of the premises are a breach of the covenant of quiet enjoyment.<sup>21</sup>

633, W. W. & D. 321, 6 L. J. K. B. 185; Burr v. Stenton, 43 N. Y. 462; O'Connor v. Memphis, 7 Lea (Tenn.) 219.

<sup>16</sup> Fuller v. Ruby, 10 Gray (Mass.) 285; Avery v. Dougherty, 102 Ind. 443, 447; Ware v. Lithgow, 71 Me. 62; Doupe v. Genin, 31 N. Y. Super. Ct. 25; The Mayor, etc., of New York v. Mabie, 13 N. Y. 151, 64 Am. Dec. 538.

<sup>17</sup> Upton v. Townsend, 17 C. B. 30.

<sup>18</sup> Manchester, etc., Ry. Co. v. Anderson, 67 L. J. Ch. 568, 2 Ch. 394, 98 Law T. (N. S.) 821.

<sup>19</sup> Ware v. Lithgow, 71 Me. 62; King v. Bird, 148 Mass. 572, 20 N. E. Rep. 196; McAlester v. Landers, 70 Cal. 79, 82, 11 Pac. Rep. 505; Greenwood v. Wetterau, 84 N. Y. Supp. 287; Mason v. Lenderoth, 84 N. Y. Supp. 740.

<sup>20</sup> Lynch v. Sauer, 16 Misc. Rep. 1, 37 N. Y. Supp. 666, affirming 14 Misc. Rep. 252; 35 N. Y. Supp. 715; Mason v. Lenderoth, 84 N. Y. Supp. 740.

<sup>21</sup> Levitsky v. Canning, 33 Cal. 299; King v. Grant, 43 La. Ann. 817, 9 So. Rep. 642. But the entry of a landlord to make necessary

The difficulty of determining whether the covenant has been broken arises from the difficulty of determining whether on the facts of the case the tenant has been evicted. An obstruction to the enjoyment of the premises or any diminution of the consideration of the lease by the landlord being a constructive eviction is a breach. An actual dispossession is not required. Thus the act of the landlord in suffering prostitutes openly to occupy a floor in a tenement house has been held to be a breach of the covenant of quiet enjoyment.<sup>22</sup> A covenant for quiet enjoyment is not broken by the entry of a municipality in the exercise of the right of eminent domain delegated to it by the state. It is not an entry under paramount title within the meaning of such a covenant.<sup>23</sup> For the exercise of the right of eminent domain by the state or by some corporation to which it has been delegated is an inseparable incident of the tenure of all real property and the parties to a deed or lease must be presumed to have taken it into consideration when they executed the instrument.<sup>24</sup>

**§ 429. Liability on the covenant for the acts of strangers.** A covenant for quiet enjoyment whether express or implied protects the lessee only against the acts of intrusion of the lessor himself or of some person claiming under him. A breach of it arises only where there is an assertion of title paramount to the lease and not merely where there is an intrusion by a wrongdoer not claiming title to the demised premises.<sup>25</sup> Thus,

repairs which are required to be made by the building department is not a breach of a covenant for quiet enjoyment, though the tenant does not consent to the entry. *White v. Thurber*, 55 Hun, 447, 8 N. Y. Supp. 661.

<sup>22</sup> *Dyett v. Pendleton*, 8 Cow. (N. Y.) 727.

<sup>23</sup> *Pabst Brewing Co. v. Thorley*, 127 Fed. Rep. 439, 440; *Osborn v. Nicholson*, 13 Wall. (U. S.) 657, 20 Law. ed. 689, in which the court said: "Like any other covenant, it must be restrained to what was supposed to be the matter in view. No grantor who warrants the pos-

session deems that he covenants against the entry of the state to make a railroad or canal, nor would it be a sound interpretation of the contract that would make him liable for it. An explicit covenant against all the world would bind him, but the law is not so unreasonable as to imply it."

<sup>24</sup> *Mayor of New York v. Mabie*, 13 N. Y. 151, 64 Am. Dec. 538; *Frost v. Earnest*, 4 Whart. (Pa.) 86; *Ellis v. Welch*, 6 Mass. 246, 4 Am. Dec. 122.

<sup>25</sup> *Abrams v. Watson*, 59 Ala. 524; *Playter v. Cunningham*, 21

a covenant of quiet enjoyment is not broken by a purchaser of the personal property of a former tenant entering upon the premises and removing his property,<sup>26</sup> or by the injury to the tenant and the disturbance of his possession resulting from mob violence not countenanced or instigated by the lessor.<sup>27</sup> Nor will an entry upon the land by the public authorities by virtue of their exercise of the right of eminent domain constitute a breach of a covenant of quiet enjoyment.<sup>28</sup>

**§ 430. The foreclosure of a mortgage as a breach of the covenant.** The sale under the foreclosure of a mortgage executed prior to the execution of the lease constitutes a breach of a covenant of quiet enjoyment express or implied which is contained in the lease. The lessee by the lease has an estate in the land and under his covenant he may recover from the lessor for permanent injury resulting from the assertion of a paramount title derived from the lessor through a mortgage given by the latter. In respect to any surplus moneys remaining after sale on foreclosure and the payment of the mortgage debt the right of the lessee is paramount to that of the lessor for the latter, in giving the lease, had thereby agreed to diminish

Cal. 229; *Branger v. Manciet*, 30 Cal. 624; *Field v. Herrick*, 14 Ill. App. 181; *Baugher v. Wilkins*, 16 Md. 35, 77 Am. Dec. 279; *Grannis v. Clark*, 8 Cow. (N. Y.) 36; *Goodrich v. Sanderson*, 55 N. Y. Supp. 881, 35 App. Div. 546. A covenant for quiet enjoyment in a lease only engages that the landlord has a good title and can give a free and unencumbered lease. *Ramsey v. Wilkie*, 13 N. Y. Supp. 554, 36 N. Y. St. Rep. 864. "Such a covenant relates to the lessor's title and right to grant the premises leased, and the possession of them during the term of the lease, and not to the possession and enjoyment of them in fact by the lessee as against those who have no right to disturb him. It is a covenant that he shall not be rightfully disturbed in his possession and enjoyment during the

term, and not that he shall not be disturbed at all during the term." The court by Wheeler, J., in *Underwood v. Birchard*, 47 Vt. 305, on page 309.

<sup>26</sup> *Kimball v. Masters, etc., of Grand Lodge of Masons, etc.*, 131 Mass. 59.

<sup>27</sup> *Surget v. Arighi*, 11 S. & M. (Miss.) 87, 49 Am. Dec. 46.

<sup>28</sup> *Schuylkill, etc., R. Co. v. Schmoele*, 20 Pa. St. 271, 273; *Frost v. Earnest*, 4 Whart. (Pa.) 86, 90; *Manle v. Ashmead*, 20 Pa. St. 483; *Ross v. Dysart*, 33 Pa. St. 452. But the landlord has his action for damages to the extent that the entry of the authorities on his land results in an injury to the reversion. The tenant may also recover for injuries to his actual possession and enjoyment of the premises.

the value of his own estate. If, therefore, for any reason the rental value of the term exceeds the rent reserved in the lease the lease becomes a serious incumbrance upon the value of the fee and the lessee is entitled, as against the lessor, to receive full compensation for his loss as where the premises are sold in foreclosure his right to possession is forever cut off.<sup>29</sup>

**§ 431. Election of remedies of the tenant.** The tenant may recoup his damages for a breach of the covenant of quiet enjoyment in an action to recover the rent or pay his rent in full and bring a separate action for his damages.<sup>30</sup> The fact that a lessee has paid his rent for nearly the whole term does not deprive him of his right to counterclaim damages for the entire term.<sup>31</sup> So, also, where the breach of covenant on the part of a lessor was his action in enjoining the lessee from taking possession of the premises, he may sue for and recover damages for the breach in an action on the covenant though in the decree dismissing the injunction the court of equity has fixed the damages sustained and the lessee has a remedy on the injunction bond. The remedies are cumulative and while the decree is conclusive as to the amount which can be recovered on the bond, it is not conclusive as to the amount which can be recovered on the covenant.<sup>32</sup>

**§ 432. Measure of damages for breach of covenant of quiet possession.** The measure of damages for a breach of the covenant of quiet possession is identical with that which is applied to the case of a failure by the lessor to put the tenant in the possession according to the terms of the lease. If the breach was due to some act of the lessor, the lessee can recover the reasonable value of the unexpired term less the rents which were reserved in the lease.<sup>33</sup> Where, however, the lessor was without

<sup>29</sup> Clarkson v. Skidmore, 4 N. Y. 297, 305.

<sup>32</sup> Hubble v. Cole, 88 Va. 236, 13 S. E. Rep. 411, 29 Am. St. Rep. 716, 13 L. R. A. 311.

<sup>30</sup> McAlester v. Landers, 70 Cal. 79, 84; Kelsey v. Ward, 38 N. Y. 83; Eldred v. Leahy, 31 Wis. 546.

<sup>33</sup> In Matter of Strasburger, 132 N. Y. 128, 30 N. E. Rep. 379, affirming 9 N. Y. Supp. 204; Mack v. Patchin, 42 N. Y. 167; Clarkson v. Skidmore, 46 N. Y. 297; Hyman v. Boston Chair Co., 13 N. Y. Supp. 609; Duncklee v. Webber,

<sup>31</sup> McAlester v. Landers, 70 Cal. 79, 84, 11 Pac. Rep. 505; Cook v. Soule, 56 N. Y. 420; Hanley v. Banks, 6 Okl. 79, 51 Pac. Rep. 664; Collins v. Lewis, 53 Minn. 78, 54 N. W. Rep. 1056; Goebel v. Hough, 26 Minn. 252, 2 N. W. Rep. 847.

151 Mass. 408, 24 N. E. Rep. 1082.

fault, the lessee can recover only such rent as he has paid in advance and any provable profits he is liable himself to pay over to another where he claims possession as a trustee.<sup>34</sup> Where the lessee has paid rent for the demised premises during the period he was actually out of possession, the measure of his damages for the ouster is the amount which has been thus paid by him plus the difference between the agreed rental value of the premises and their fair rental and reasonable value.<sup>35</sup> Special damages not too remote may be recovered if they are alleged in the complaint.<sup>36</sup> The tenant may recover as special damages any expenses he may have been put to which were the natural and direct consequences of the breach of the covenant of quiet enjoyment. Thus, the tenant may recover from the lessor the costs and counsel fee which he paid in defending his possession in an action which was brought to oust him by the lessor<sup>37</sup> or where the premises were occupied by him as grazing land for his cattle, he may recover as special damages the cost and expense of keeping his cattle on common land while diligently seeking to lease new pasture for them.<sup>38</sup> He may recover all damages which are ascertainable from reliable evidence but not generally estimated or prospective profits which he would have made upon the premises during the time his possession was disturbed. The measure of the tenant's damages in the case of the breach of a covenant of quiet enjoyment where he has been excluded from the possession but has been compelled to pay rent for the premises is the difference between the rental agreed upon in the lease and the actual rental value of the premises to which must be added the amount paid by the tenant to the landlord. In view of this rule it becomes important to consider what elements are to be taken into consideration in determining this value. The value of the term must depend upon the circumstances in each particular case. These circumstances are the length of the term and the conditions of the contract of lease, the character

<sup>34</sup> *In re Strasburger*, 132 N. Y. 128, 30 N. E. Rep. 379.

Co., 59 N. Y. Super. Ct. 116, 13 N. Y. Supp. 609.

<sup>35</sup> *Riley v. Hale*, 158 Mass. 240, 33 N. E. Rep. 491. But compare *Blossom v. Knox*, 3 Chand. (Wis.) 295, 3 Pin. 262.

<sup>37</sup> *Levitzky v. Canning*, 33 Cal. 299.

<sup>36</sup> *Hyman v. Boston Chair Mfg.*

<sup>38</sup> *Buck v. Marrow*, 2 Tex. Civ. App. 361, 21 S. W. Rep. 398.

of the demised property, its location and general condition as to repairs, the readiness with which it may be let, the character of the building whether it be substantial and durable or the reverse, the uniformity of the rents in the neighborhood or the reverse. Every material consideration which might enter the mind of a purchaser of the term in estimating what would be a fair price for it must be considered. The value of the fee may be an element to be considered in determining the fair rental value of the property but it is not the only legal basis of calculation. Unimproved city lots, for example, are often leased at a very small rental as compared with the value of the fee while similar lots having buildings on them command a much higher rental in proportion because of the expense imposed upon the lessor of caring for and repairing these structures. It has therefore been held improper to estimate the annual rental value of premises by calculating interest at the rate of six per cent upon the amount which the premises sold for under foreclosure and multiplying this by the number of years which the lease had still to run.<sup>39</sup> And not only are the facts above mentioned relevant to be proved where the rental value is concerned but the opinion of experts also as to what is the fair market value of the term must be considered.<sup>40</sup>

**§ 433. The rights of the parties to the lease as against one who maintains a nuisance.** The tenant of the demised premises, though he has no estate in the land except his term, is the owner of the use of the land for the term of the contract of rental. Hence, he may recover damages for any injury to his use of the land caused by the erection or maintenance of a nuisance in the immediate neighborhood of the premises.<sup>41</sup> The tenant's right of action is not destroyed by the fact that the nuisance existed before the lease was executed.<sup>42</sup> On the other hand the landlord may recover damages for a nuisance erected and maintained near the demised premises during the term so far as his reversionary interest is injured thereby.<sup>43</sup> Under some cir-

<sup>39</sup> Clarkson v. Skidmore, 46 N.Y. 297, 302.

<sup>42</sup> Bly v. Edison Electric Illuminating Co., 172 N.Y. 1, 64 N.E. Rep. 745, reversing 66 N.Y. Supp. 737.

<sup>40</sup> Clarkson v. Skidmore, 46 N.Y. 297, 302.

<sup>41</sup> Bentley v. Atlantic, 92 Ga. 623, 18 S.E. Rep. 1013, 1014; Cromwell v. Railroad Co., 61 Miss. 631.

<sup>43</sup> Cooper v. Randall, 59 Ill. 317, 325; Lachman v. Deisch, 71 Ill. 59, 60. See, also, as to the right

cumstances a landlord may have an action against his tenant for a nuisance maintained by the tenant upon the leased premises without the consent of the landlord. A tenant like every other person is bound to make such a reasonable use of his property as will not occasion unnecessary annoyance or damage to his neighbors. If the tenant makes an unreasonable or unlawful use of his land to the injury of others he is guilty of maintaining a nuisance and he is responsible in damages to those he injures. And if the landlord owns property which is damaged by the illegal act of his tenant, the relationship existing between them does not estop the landlord from enjoining the continuance of the nuisance, or from recovering damages for the injury to his property, provided, when he leased the premises he was not informed as to the illegal contemplated use of them by the tenant. The landlord has a right to assume that the tenant has rented the premises for a legal purpose, that the tenant will use them for such a purpose and that he will not maintain a nuisance on the premises during his occupancy. So, where the premises are let for a lawful business which, if not properly conducted, may create a nuisance, the landlord, knowing the business by which the premises are to be occupied, has a right to assume that proper methods will be employed by the tenant and that he will not allow the business to become a nuisance.<sup>44</sup>

of the tenant to sue for damages for a nuisance which injures his possession. *Sherman v. Fall R. I. Works*, 2 Allen (Mass.) 524, 79 Am. Dec. 799; *Getz v. Phila. & Read. Ry. Co.*, 105 Pa. St. 547;

*Nashville, C. & St. L. Ry. Co. v. Heickens* (Tenn.), 79 S. W. Rep. 1038, 1041.

<sup>44</sup> *Fogarty v. Junction City Press Brick Co.*, 50 Kan. 478, 31 Pac. Rep. 1052.

## CHAPTER XIX.

### THE TENANT'S WASTE.

- § 434. Definition of "waste."
- 435. The common-law rule as to waste by tenants.
- 436. The implied covenant by a lessee not to commit voluntary waste.
- 437. The opening of mines by a tenant.
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- 445. The landlord's remedy by injunction.
- 446. The remedy by an action for damages.
- 447. The waiver of the right of the landlord to sue for waste.

**§ 434. Definition of waste.** Speaking in a general sense as between landlord and tenant, waste is the destruction or material and permanent injury of any portion of the premises by reason of which the value or usefulness of the premises to the landlord is diminished. What particular action on the part of the tenant shall be waste depends upon the circumstances of each case. There must, however, be some permanent damage to the premises by which its value is permanently diminished. A mere insignificant injury or an injury which for a time diminishes the value of the premises is not waste. Thus, for illustration, using the premises for a purpose different from that mentioned in the lease is not waste unless there results therefrom some lasting injury to the premises for there must be some change in the physical character or identity of the premises themselves in order to constitute waste. It is not always necessary that this physical change shall be a taking away for it may result from something added to the premises if thereby their character is materially changed.<sup>1</sup> The tenant during the

<sup>1</sup> In *Lord D'Arcy v. Askwith*, waste depends was stated thus: Hob. 234, the principle upon which "It is generally true that the

term has the use, but not the complete dominion of the property demised to him. For this reason he cannot make permanent changes in its character without the consent of the landlord, though this would increase the value of the property, because the effect of making these changes is to deprive the landlord of his dominion over the property and to compel the landlord to yield his own tastes and inclinations to that of the tenant. A landlord has an absolute right to have his land and house kept in an unaltered state, surrounded by all their old features, landmarks and associations. Hence in determining whether an act of waste has been committed by a lessee on the demised premises, the test is whether the act complained of by the lessor is an act which alters the nature of the thing demised.<sup>2</sup> And it is also necessary in order to constitute waste that the alteration or change which is alleged to be waste on the part of the tenant shall have been made without the consent of the landlord. Waste is divided into voluntary or commissive waste and permissive waste. Commissive or voluntary waste is always the result of some action on the part of the tenant. It usually consists in his making some change in the nature or character of the demised premises either by adding something thereto or by taking something therefrom. Permissive waste, on the other hand, is suffering or permitting the premises to fall into decay where it consists of buildings, fences, etc., or neglecting to cultivate a farm in a husbandlike manner, or in suffering a pasture or meadow to be overgrown with bushes.<sup>3</sup>

lessee hath no power to change the nature of the thing demised; he cannot turn meadow into arable land, nor stub a wood to make it pasture, nor dry up an annual pool or piscary, nor suffer ground to be surrounded, nor destroy the pale of a park, for then it ceaseth to be a park, nor he may not destroy the stock or breed of anything, because it disinherits and takes away the perpetuity of succession, as villeins, fish, deer, young spring of wood or the like."

<sup>2</sup> West Ham Central Charity Board v. East London Waterworks

Co., 69 Law J. Ch. 257, (1900) 1 Ch. 624, 82 Law T. (N. S.) 85, 48 Wkly. Rep. 284.

<sup>3</sup> "Strictly speaking," say the court, in *Proffit v. Henderson*, 29 Mo. 325, "waste is a lasting damage to the inheritance caused by the destruction of such things on the land as are not essential to its temporary profit, and may be predicated even when the act complained of was necessary to the profitable enjoyment of the land, as clearing of land, when it was valuable only for timber." It is not necessarily the injury to the

§ 435. The common law rule as to waste by tenants. By the ancient common law in England, tenants of land, except such whose estates were created by operation of law, as tenant in dower or guardian in chivalry, were not liable to an action for waste. To remedy this and to protect the landlord against waste by tenants of estates created by feoffment and grant the statute 52 Henry III, c. 23 commonly called the Statute of Marlebridge was passed in 1267. By this it was in substance provided that all tenants of terms should be responsible for waste to their landlord unless the tenant should have the permis-

estate that constitutes waste, but the disherison of the reversioner." See, also, *Livingstone v. Reynolds*, 26 Wend. (N. Y.) 122. Other definitions of waste may be found in *Bond v. Lockwood*, 33 Ill. 212; *Dawson v. Coffman*, 28 Ind. 220; *Calvert v. Rice*, 11 Ky. Law Rep. 1001; *Pynchon v. Stearns*, 11 Met. (Mass.) 304, 45 Am. Dec. 207; *Proffitt v. Henderson*, 29 Mo. 325; *Keeler v. Eastman*, 11 Vt. 293. "From these definitions, to constitute waste, the injury to real property must be of a permanent character, some act which does a lasting injury to the property, or tends to destroy its identity. And as we have seen, this may be effectually accomplished by any material and substantial alteration of the property. But when the alteration made is authorized by the agreement of the parties it will not be waste. By the terms of his lease, the defendant is authorized to make alterations in the building. The stipulation is that he 'may make alteration in the building now on said land so as to adapt it to other business than that of a livery stable.' But does the right to make alterations in the building, so as to adapt it to other business than that of a livery stable, confer or include the

power to tear down and destroy such building or to erect or rebuild a new or different structure? To alter, or 'to make alterations' in a building or thing, it is necessary to vary or change the form or nature of such building or thing without destroying its identity. The idea is, that the identity of the subject is preserved, although the form or nature may have been modified or changed. (Abbott's Law Dict. tit. Alter.) To tear down a building is not to alter, but to destroy its existence as such. 'Nothing which ceases to exist can, in any proper sense, be said to be altered. If it is altered, it has merely changed its form or nature, but still has an existence.'

\* \* \* From this, we conclude that the right conferred upon the defendant to make alterations in the building, and to fit it for some other than the livery business, does not include or confer the power to tear down and destroy such building, although he may erect a better or more expensive structure in the place thereof.  
\* \* \* To pull down or destroy a building without authority so to do by the tenant is waste." By the court in *Davenport v. Magoon*, 13 Oreg. 3, on page 8.

sion of the landlord in writing to do the waste. This not proving sufficient to remedy the evil it was aimed at, the Statute of Gloucester, 6 Edw. I, c. 5, was passed in 1287 by which the aggrieved landlord was given a writ of waste in chancery against a tenant for life or years who committed waste together with treble damages. These very ancient statutes are important, inasmuch as they had been in operation many years in England; and were a part of the English common law jurisprudence and were introduced as such into the United States at the time of the Revolution.<sup>4</sup>

**§ 436. The implied covenant by a lessee not to commit voluntary waste.** In the absence of an express agreement to the contrary, there is in every lease an implied covenant upon the part of the tenant so to conduct himself while in the occupation and possession of the demised premises that no waste shall be committed. He must by reason of such implied covenant neither commit nor permit any injury to be done to the inheritance and he must at the end of the term return it to the lessor uninjured by any wilful or negligent act on his part. This implied agreement is a part of the lease as much as if it were inserted in it in express language and results from the relationship of landlord and tenant. It is not merely an implied covenant to repair the premises for it exists even in cases where the lessor has expressly covenanted to do all the re-

<sup>4</sup> The language of the statute of Marlebridge is as follows: "Also farmers during their terms shall not make waste, sale or exile of house, woods and men, nor of anything belonging to the tenements, that they have to farm, without special license had by writing of covenant making mention that they may do it; which thing if they do and therefore be convicted, they shall yield full damages and shall be punished by amerciament." The statute of Gloucester is: "That a man from henceforth shall have a writ of waste in the Chancery against him that holdeth by the law of England, or

otherwise, for term of life, or for term of years, or a woman in dower, and he which shall be attainted of waste shall lose the thing that he has wasted and moreover shall recompense thrice so much as the waste shall be taxed at." It need not be proved that the damage done to the inheritance by the tenant was the result of negligence for a tenant's liability for waste does not at all depend upon his negligence, but upon considerations of public policy. *Parrott v. Barney*, Fed. Cases, 10,773; 1 *Sawy.* 423; 2 *Abb. U. S.* 197, affirmed in *Nitroglycerine Case*, 82 U. S. 524, 21 L. ed. 206.

pairs.<sup>5</sup> The fact that the lessee has an option to purchase the premises during the term does not exclude this implied covenant for until this option is exercised, the lease is in operation and remains intact. As soon as the option is exercised, the lease is at an end and the relation of vendor and vendee exists though the lessee is still liable for any prior breach of this implied covenant. And an action by the lessor will lie on the implied covenant not to commit voluntary waste to the same extent as though it were an express covenant.<sup>6</sup> And the general rule is that the lessee is liable on his implied covenant against voluntary waste even though the injury was caused by some person over whom he had no supervision or control.

**§ 437. The opening of mines by a tenant.** The act of a tenant for years in opening new mines or pits on the estate is waste.<sup>7</sup> Thus, it is waste on the part of the tenant for years of farm land to take stones from a quarry on the land.<sup>8</sup> If, however, there was an open mine or quarry upon the land at the time of the execution of the lease and it appears at all probable that the parties intended that the tenant might work the mine or quarry, the tenant's action in so doing will not be waste.<sup>9</sup> But the unauthorized taking and removal of oil from the land by a tenant constitute waste.<sup>10</sup> It is also waste for the tenant for years to dig for gravel, lime, coal or brick clay or the like hidden in the earth and not in pits open at the date of the execution of the lease where the land is hired by the tenant for farming purposes.<sup>11</sup> But he may open pits and dig for gravel and clay for use on the premises in connection with the ordinary

<sup>5</sup> Powell v. D. S. & G. R. R. R. Co., 16 Oreg. 33, 35, 16 Pac. Rep. 863, 8 Am. St. Rep. 251; Holford v. Dunnett, 7 Mees. & W. 352; United States v. Bostwick, 94 U. S. 66.

<sup>6</sup> Powell v. Dayton S. & G. R. R. R. Co., 16 Oreg. 33, 37, 16 Pac. Rep. 863, 8 Am. St. Rep. 251. See, also, Frey v. Johnson, 22 How. Pr. (N. Y.) 316.

<sup>7</sup> Hill v. Taylor, 22 Cal. 191; Owings v. Emery, 6 Gill (Md.) 260; United States v. Parrott, 1 McAllister (U. S. C. C.) 271.

<sup>8</sup> Freer v. Stotenbur, 34 How. Pr. (N. Y.) 440, 447.

<sup>9</sup> Clegg v. Rowland, L. R. 2 Eq. P. Cas. 165; Viner v. Vaughan, 2 Beav. 466, 469; Saunderson's Case, 5 Coke, 12; Clavering v. Clavering, 2 P. Wms. 388.

<sup>10</sup> Isom v. Rex Crude Oil Co., 147 Cal. 659, 82 Pac. Rep. 317.

<sup>11</sup> Viner v. Vaughan, 2 Beav. 466; Bacon's Abr. tit. Waste (c) 3; Higgon v. Mortimer, 6 C. & P. 616; D'Arcy v. Askwith, Hob. 234; Phillips v. Smith, 14 M. & W. 590, 593.

use of the premises. Sometimes the question whether the working of mines which are opened by a tenant for life is waste or not is a question of fact to be determined by all the circumstances of the case.<sup>12</sup> The conduct of a tenant of a farm in collecting and selling the stones which were turned up in the ordinary course of ploughing his land is not waste; nor is it a breach of a reservation by the landlord of all mines, minerals and quarries of stone, sand and gravel. The gathering up of the stones and the collecting of them together is a part of the use of the farm which the tenant is authorized to make and his action in doing this is an incident to the proper cultivation of the land. Indeed it is necessary for him to do this to get the best results from his farming and he will be only liable to his landlord if he sells the stones for their actual value, out of which he must be allowed the reasonable expense of collecting and removing them.<sup>13</sup>

**§ 438. Leases made without impeachment of waste.** Sometimes leases are made "without impeachment of waste," that is to say, clauses are inserted expressly exempting the tenant from liability for waste committed by him. A tenant whose lease is "without impeachment of waste" usually has the right to cut timber, plow up meadow or pasture land, work old mines or open up new ones for his own use, but not to demolish or alter buildings or to cut down trees which are laid out in lines or avenues whether planted or growing naturally where they serve for ornament or shelter and were planted for that purpose.<sup>14</sup> He is not permitted under such a clause to do any act which may be regarded as destructive or malicious.<sup>15</sup> He must use the building or the land according to the purposes for which he has hired them. His dominion over the land as a tenant is not extended by the provision exempting him from responsibility for waste. In England the rule of the right of the tenant

<sup>12</sup> A tenant who in removing a dung heap digs into and removes a portion of the soil may be proceeded against in trover by the landlord. *Higgon v. Mortimer*, 6 C. & P. 616.

<sup>13</sup> *Tucker v. Linger*, 51 L. J. Ch. 713, 21 Ch. D. 18, 46 L. T. 198, 30 W. R. 425; S. C. in H. L. 52, L. J.

Ch. 941, 8 App. Cas. 508, 49 L. T. 373, 32 W. R. 40, 48 J. P. 4.

<sup>14</sup> *Packington's Case*, 3 Atk. 215; *Garth v. Cotton*, 3 Atk. 756; *Chamberlane v. Dumorier*, 1 Bro. C. C. 166, 3 Bro. C. C. 549.

<sup>15</sup> *Stevens v. Rose*, 69 Mich. 259, 37 N. W. Rep. 205.

to enjoy land without impeachment of waste is most often applied to life tenants and is mainly invoked where the life tenant is cutting timber upon the land for the purpose of selling the same.

**§ 439. Alterations by the tenant constituting voluntary waste.** The action of the tenant in making material alterations in the demised buildings, whether to suit his taste or convenience which so alters their character as to render them unfit for occupancy for other purposes than his own, constitutes voluntary waste when done without the consent of the landlord.<sup>16</sup> The latter may enjoin the making of material alterations by the tenant.<sup>17</sup> The use only and not the ownership of the premises are conferred upon the tenant by the lease. He cannot do anything with the premises themselves not absolutely consistent with his recognition of the landlord's ownership unless the landlord shall waive a portion of his rights as owner. Nor will the tenant's right to use the premises create in him any right to alter them to a material extent no matter to what extent his profit or convenience may be enhanced thereby. The right of the tenant to make alterations will never be implied from the relationship of landlord and tenant alone. It may be created by express agreement though, as such a right is in derogation

<sup>16</sup> *Stetson v. Day*, 51 Me. 434; *Cannon v. Barry*, 59 Miss. 289; *Davenport v. Magoon*, 13 Oreg. 3, 4 Pac. Rep. 299, 301; *Peer v. Wadsworth*, 67 N. J. Eq. 191, 58 Atl. Rep. 379, 381; *Kidd v. Dennison*, 6 Barb. (N. Y.) 9, 13; *Phelan v. Boylan*, 25 Wis. 679; *Brock v. Dole*, 66 Wis. 142, 28 N. W. Rep. 334; *Baugher v. Crane*, 27 Md. 36, 43. The removal by the lessee of a portion of the premises is waste if the landlord do not consent. *Bass v. Metropolitan West Side El. R. Co.*, 82 Fed. Rep. 857, 27 C. A. 147, 39 L. R. A. 711.

<sup>17</sup> *Denechaud v. Trisconi*, 26 La. Ann. 402; *Douglass v. Wiggins*, 1 John. Ch. (N. Y.) 435. (Change of dwelling house into warehouse or store restrained.) *Agate v.*

*Lowenbein*, 57 N. Y. 604; *Brock v. Dole*, 66 Wis. 142, 28 N. W. Rep. 334. It is not material that the value of the premises are increased by the alterations made by the tenant. *Brock v. Dole*, 66 Wis. 142, 145, 28 N. W. Rep. 334; *Kidd v. Dennison*, 6 Barb. (N. Y.) 9, 13; *Douglass v. Wiggins*, 1 Johns. Ch. (N. Y.) 435; *Jackson v. Andrews*, 18 Johns. (N. Y.) 434. The ground of the statement that alterations are waste is that they change the identity of the premises. The lessor is entitled to have returned to him at the expiration of the term the same premises that he originally demised. *Brock v. Dole*, 66 Wis. 142, 145, 28 N. W. Rep. 334.

of the complete dominion and control which the common law confers upon the owner of the fee, the agreement must be substantially proved upon all the facts.<sup>18</sup> Hence, it follows from these rules that the pulling down of walls between a parlor and a chamber, whereby the tenant greatly enlarges the parlor, is waste and the same would be true if he pulls down the walls between two sleeping rooms. So, demolishing a hall or parlor and making a stable out of it, is a clear example of waste. The same would be true of demolishing a garret in a house and even breaking a wall covered with thatch or timber fences, is waste. In a word, any alteration on the part of the tenant which changes the character of the premises, is waste. So, the conversion of a private house into a shop or of a shop into a private house, may be waste.<sup>19</sup> And even the building of a new house on land where there was none before, would be regarded as waste if it prevents the convenient use of the land by the landlord.<sup>20</sup> A tenant who cuts a door through a party wall part of which is upon his premises for the purpose of connecting his premises with a house occupied by him upon the adjacent lot is guilty of waste and the landlord may compel him to repair the waste at once instead of accepting security that he will have it restored at the end of the term for which the premises are leased.<sup>21</sup> But very trifling alterations in a house which do not materially injure it or render it unfit for occupancy, may not be waste. Thus, while tearing down a house or even a wall, whether an inner wall or an outer one forming a boundary, would unquestionably be waste, slight alterations in the interior of the premises, such as cutting a door through an interior partition, or taking away one, or putting up shelves or other fixtures, or substituting a door for a window or *vice versa*, or closing a door or a window which opens on a courtyard might not, under all the circumstances, be waste.<sup>22</sup> In construing a covenant against waste, the nature of the alteration made in

<sup>18</sup> Agate v. Lowenbein, 57 N. Y. 604, 608.

<sup>19</sup> Douglass v. Wiggins, 1 John. Ch. (N. Y.) 435.

<sup>20</sup> Smyth v. Carter, 8 Beav. 78.

<sup>21</sup> Klie v. Von Broock, 56 N. J. Eq. 18, 37 Atl. Rep. 469, 473.

<sup>22</sup> Jackson v. Tibbitt, 23 Wend. (N. Y.) 341; Winship v. Pitts, 3 Paige (N. Y.) 259; Agate v. Lowenbein, 57 N. Y. 604; Klie v. Von Broock, 56 N. J. Eq. 18, 37 Atl. Rep. 469; Young v. Spencer, 10 Barn. & Cres. 145.

the premises by the tenant must be carefully considered. If the alterations and changes which are alleged to constitute the waste are of such a nature that they improve rather than injure the premises, there are some authorities, though the rule is not universal, that intimate that such alterations cannot constitute waste. This rule is confined to cases where the use of the premises is not changed to any material extent. It would certainly apply whether or no there is an express covenant against waste, to the case of a lease which provided that the tenant might improve property to fit it for the business which the landlord knew he intended to carry on there.<sup>23</sup>

**§ 440. Waste by a tenant of farm land.** It has been held that what is waste in England, is equally so in America, and that any conduct on the part of the tenant of farm lands which leaves lands less fertile, or changes their culture or mars the woods or structures upon them, is waste but that in the case of wild land, the clearing of this is not waste as without such a clearing, the tenant would derive no benefit from it.<sup>24</sup> It is waste for a tenant of farm land to turn an ancient meadow or pasture into plowed land.<sup>25</sup> This has been the English rule, though under

<sup>23</sup> Hasty v. Wheeler, 12 Me. 434, 437. It is waste for a tenant of marsh land, which he had leased for the purpose of building a reservoir thereon, to permit a sub-tenant to deposit large quantities of rubbish on the land by reason of which the surface is raised about ten feet above its former level and the condition of the premises is materially changed. The depositing of rubbish on the land constitutes such a change in its character by the tenant as to be voluntary waste, and the fact that the value of the land for building purposes had been increased by the raising of its level is no defense to an action for damages for the waste. West Ham Central Charity Board v. East London Waterworks Co., 69 Law J. Ch. 257, (1900) 1 Ch. 624, 82

Law T. (N. S.) 85, 48 Wkly. Rep. 284. The removal by a tenant of staircases, elevators, etc., from a building which, when he had leased the demised premises, he had agreed with the landlord to erect thereon, is waste. Palmer v. Young, 108 Ill. App. 252. The removal from the premises by an assignee of the lessee without the landlord's consent of benches, shafting, platforms, etc., which were in the building when leased to the original lessee is waste under the Missouri statute giving a remedy in unlawful detainer for waste committed. Champ Spring Co. v. B. Roth Tool Co., 103 Mo. App. 103, 77 S. W. Rep. 344.

<sup>24</sup> Johnson v. Johnson, 2 Hill's Eq. (S. C.) 277, 283.

<sup>25</sup> Chapel v. Hull, 60 Mich. 167, 174, 26 N. W. Rep. 874; Jackson

the circumstances in America it is not applied so strictly. It has been held that the conversion of meadow into arable land is not in fact waste in view of the necessity which arises in

v. Brownson, 7 Johns. (N. Y.) 227; Smith v. Sharpe, Busbee (N. C.) 91; Lord Darcy v. Askwith, Hob. 234; Phillipps v. Smith, 14 M. & W. 589, 594. "A due proportion of meadow land upon a farm of the size and kind in question is consistent with good husbandry in the neighborhood, as appears from the record before us; and upon principle, it would be waste for an outgoing tenant to plow up all the meadow land upon the farm as much as it would be for an outgoing tenant of garden ground to plow up strawberry beds." Chapel v. Hull, 60 Mich. 167, 174, 26 N. W. Rep. 874. In England the cutting down of young plants destined to be trees, the cutting down of apple or other fruit trees, the cutting down a hedge of thorns or the eradicating or cutting unseasonably of white thorns is waste. Co. Litt. 43, 53a; Phillipps v. Smith, 14 M. & W. 590, 592. But the cutting down of certain bushes and trees of great age which are not timber by law or custom is not waste. The cutting of willows which are not timber and which when cut down grow up again from their stumps and produce the usual annual profit is not waste. Phillipps v. Smith, 14 M. & W. 590, 594. If, however, trees which are not legally timber are cut down, it may be waste in a case where they stood for the protection of a house from the wind or in a bank to sustain it against a flood. The cutting of bushes by a tenant cannot be waste if they

naturally grow up again. But grubbing them up by the tenant may be waste. Co. Litt. 53a; Berriman v. Peacock, 9 Bing. 384. In Jackson v. Brownson, 7 Johns. (N. Y.) 227, 232, it was said "everything is waste which does a permanent injury to the inheritance," and also "the general definition of waste is that it is a destruction in houses, gardens, trees or other corporeal hereditaments, to the disinhension of him in remainder or reversion." It was also held that while the doctrine of waste as understood in England, in relation to timber was inapplicable to a new unsettled country, yet the principle of the prohibition against waste is the same in both countries, though in the application of it regard must be had to the different situations and customs of the countries; that the felling of timber in England is waste because it is always considered an injury to the inheritance, but in this country a discrimination must be made upon a reference to the state of the property at the time of the demise and that a lessee of land entirely or chiefly woodland has a right to fell a part of the timber so as to fit the land for cultivation, but not so as to cause an irreparable injury to the reversion by sweeping away what might be indispensably necessary for keeping the fences and other erections and the farm in proper repair; and that the extent to which wood may be cut before a tenant becomes guilty of waste

America for the cultivation of land.<sup>26</sup> In relation to the cutting of timber, the rules regulating the subject of waste in connection with farm land in America differ somewhat from the English rules. In America it is not usually considered waste for the tenant of farm land to cut down such timber as he may necessarily use upon his land for the purpose of cultivating it,<sup>27</sup> though it would be waste for him to cut down timber upon the land and sell it. Thus, the clearing of wood land and the sale of the wood on the part of the tenant for years of a cultivated farm hired for dairy purposes and which was about one-fifth timber land has been held waste though the value of the farm was increased thereby.<sup>28</sup> In America in cases of waste by felling timber, regard has been had to the condition of the land and whether good husbandry and the situation of the property required the land to be cleared; but where trees are cut for no purpose connected with the immediate improvement of the land and are sold off the land without intending to apply the proceeds to the improvement of the land waste is committed and the tenant has no right to recoup for improvements he might have made at some other time.<sup>29</sup> The tenant is guilty of

must be left to the sound discretion of a jury under the direction of the court.

<sup>26</sup> King v. Miller, 99 N. C. 583, 594, 6 S. E. Rep. 660.

<sup>27</sup> Den v. Kinney, 5 N. J. L. 552.

<sup>28</sup> McGregor v. Brown, 10 N. Y. 114; Fleming v. Collins, 2 Del. Ch.

230; Calvert v. Rice, 13 Ky. Law Rep. 107; Padelford v. Padelford, 7 Pick. (Mass.) 152; Butman v.

James, 34 Minn. 547, 27 N. W. Rep. 66; Clement v. Wheeler, 25 N. H. 361; Morehouse v. Cotheal,

22 N. J. Law, 521; Kidd v. Dennison, 6 Barb. (N. Y.) 9; McGregor v. Brown, 10 N. Y. 114; Van Deusen v. Young, 29 N. Y. 9; Robinson v. Kline, 70 N. Y. 147; Jackson v. Brownson, 7 Johns. (N. Y.)

227, 5 Am. Dec. 258; Smith's Appeal, 69 Pa. St. 474. It is not necessarily waste for a lessee to plow

up meadow land in order to cultivate it in corn where there was no restriction on the tenant's method of cultivation, except that it was provided that "the land should be farmed in a way to prevent injury to the same in so far as injury could reasonably be prevented." The court in determining this took into consideration the fact that the land in question had been planted in corn twelve or fifteen times in the past thirty years, that it was the best land for corn on the place and the most easily reset in grass. Hubble v. Cole, 85 Va. 87, 7 S. E. 242.

<sup>29</sup> Morehouse v. Cotheal, 22 N. J. Law, 521. In many cases it has been expressly held that the doctrine of tenant's waste as laid down by the English cases is not applicable to the United States ow-

waste even though he cut timber for repairs if he shall subsequently sell it and then buy it back again and use it in making the repairs.<sup>30</sup> But an action for waste cannot be based upon anything which results from natural causes unless the tenant has expressly agreed to restore the premises to their former condition. So, where wood has blown down, the tenant who cuts it up and sells it cannot be sued for waste though damages can be recovered against him for the conversion of the wood.<sup>31</sup> It is not waste for the tenant to cut down trees for the purpose of fuel, but in doing so, however, he must observe the rules of good husbandry and will not escape his liability to the landlord if he shall cut down sound trees for fuel when there are those which have been blown down on the land, or which are beginning to decay sufficiently for his purpose.<sup>32</sup> In America it is not regarded as waste for a tenant of wild land leased for the purpose of cultivation to cut down sufficient timber to enable him to cultivate it as a farm. He must not, however, cut down all the timber on the land where he has leased it for farming purposes.<sup>33</sup> So, express permission given by a landlord to his tenant to cut and use wood from that part of the land which he desires to clear for agricultural purposes does not by implication give the tenant liberty to cut down and sell timber

ing to the different circumstances of a new and unsettled country. *Kidd v. Dennison*, 6 Barb. (N. Y.) 9; *Ward v. Sheppard*, 3 N. C. 283, 2 Am. Dec. 625; *Crockett v. Crockett*, 2 Ohio St. 180; *Keeler v. Eastman*, 11 Vt. 293; *Findlay v. Smith*, 6 Munf. (Va.) 134, 142, 148, 8 Am. Dec. 733. The rules regulating the definitions of waste as regards the cutting of timber, may be found in *Keeler v. Eastman*, 11 Vt. 293; *Findlay v. Smith*, 6 Munf. (Va.) 134, 142, 148; and in *Chase v. Hazelton*, 7 N. H. 171; *Sanders v. Bryer*, 152 Mass. 141, 25 N. E. Rep. 86.

<sup>30</sup> Co. Litt. 53b.

<sup>31</sup> *Houghton v. Cooper*, 6 B. Mon. (Ky.) 281; *Shult v. Barker*, 12 S. & R. (Pa.) 272; *Harris v. Goslin*,

3 Harr. (Del.) 19; *Mooers v. Wait*, 3 Wend. (N. Y.) 104.

<sup>32</sup> *Paddleford v. Paddleford*, 7 Pick. (Mass.) 152.

<sup>33</sup> *Jackson v. Tibbitts*, 3 Wend. (N. Y.) 341; *Adams v. Breveton*, 3 H. & J. (Md.) 124; *Lambeth v. Warner*, 2 Jones (N. C.) 165. Ploughing meadow has been held to be waste (*Jones v. Whitehead*, 4 Clark (Pa.) 330); if the change is contrary to good husbandry or damaging to the inheritance. *Clemence v. Steere*, 1 R. I. 272, 53 Am. Dec. 621. See, also, *Crockett v. Crockett*, 2 Ohio St. 180. Permitting meadow land to be overgrown with weeds is waste under certain circumstances. *Clemence v. Steere*, 1 R. I. 272, 53 Am. Dec. 621.

from the land generally.<sup>34</sup> So, a tenant for a term of years of uncleared land may cut timber as the needs of his family may require and he may clear the land for cultivation taking, however, such portions only as a prudent owner in fee would take for cultivation. But he must always leave enough lumber standing for the permanent use of those who after him may own the fee of the land.<sup>35</sup>

<sup>34</sup> Ladd v. Shattock, 90 Ala. 134, 7 So. Rep. 764.

<sup>35</sup> Moss Point Lumber Co. v. Board of Sup'rs of Harrison Co., 89 Miss. 899, 42 So. Rep. 290. "It is true that what would in England be waste is not always so here. The covenant must be construed with reference to the state of the property at the time of the demise. The lessee has undoubtedly a right to fell part of the timber, so as to fit the land for cultivation; but it does not follow that he may with impunity destroy all the timber, and thereby essentially and permanently diminish the value of the inheritance. Good sense and sound policy, as well as the rules of good husbandry, require that the lessee should preserve so much of the timber as is indispensably necessary to keep the fences and other erections upon the farm in proper repair. The counsel for the defendant is mistaken when he says that lessees in *England* are prohibited from cutting wood upon the demised premises altogether, the prohibition, in principle, extends no further, in this respect, than it does here. In *England*, that species of wood which is denominated *timber* shall not be cut down, because felling it is considered as an injury done to the inheritance. Here from the different state of many parts of

our country, *timber* may, and must be cut down to a certain extent, but not so as to cause an irreparable injury to the reversioner. To what extent wood may be cut before the tenant is guilty of waste must be left to the sound discretion of a jury, under the direction of the court, as in other cases. What kind of wood in *England* is deemed to be timber, depends upon the custom of the county. Wood which in some counties is called timber is not so in others. (Duke of Chandos v. Talbot, 2 P. Wms. 606; Countess of Cumberland's Case, Moore's Rep. 812, Co. Litt. 536; Cook v. Cook, Cro. Car. 531, Cro. Jac. 126n.) So a lessee for years is entitled to reasonable *estovers*; but he is guilty of *waste* if he cuts green trees when there is *dry wood* (*aridum lignum*) sufficient. So, again, if there be a tenant for life without impeachment of waste, he may cut down all sorts of timber, and convert them to his own use, but if he wantonly cuts down timber which serves for ornament, or shelter, or is not fit to be felled he is punishable for waste (1 Cr. Dig. 80). The principle upon which all these cases were decided is that which I have before stated, namely, that whenever wood has been cut in such a manner as materially to prejudice the inheritance, it is waste; and

§ 441. **The rule in Maryland as to waste by a tenant.** It has been held that the doctrines of the common law respecting waste do not apply to a species of tenancy common in Maryland and in one or two other states by which land is leased for a long time, as for example, for ninety-nine years, with a privilege of perpetual renewals. If the common law rule were applied to such cases, an injustice would be done the tenant in view of the fact that these leases are usually of vacant land made with an intention on the part of both the parties that the tenant shall build more or less costly buildings thereon, of which he shall have the exclusive control thereof. The modification of the common law rule here made is an application of the principle well recognized in the United States, that common law doctrines shall be conformed to the social, domestic and political situation in the United States which differs very materially from that which prevails where the common law had its origin. In a few of the states, large portions of the land in the cities are leased for very moderate rentals upon such perpetual leases, and from the fact that the leases are subject to a perpetual renewal, it has always been understood and held that the lessee may do what he pleases in controlling and managing the demised land so long as he pays the rent agreed upon. If the right of the lessor to his rent is protected, he cannot complain because the tenant makes alterations in the buildings which he has erected as would constitute waste at common law. The lessor cannot, unless he can show actual damage, declare the forfeiture of such a perpetual lease merely because the tenant materially alters or even removes the buildings which he has placed upon the land demised. The law, however, will protect the right of the landlord to his rent and to have security for its payment; and as it is evident that the security for the rent is increased by the presence of valuable buildings upon the land where the landlord has a right to re-enter for non-payment of rent, it follows in reason that if the tenant removes such buildings with a necessary result that the security for rent is diminished, the landlord may treat it as waste and equity will restrain the tenant from further action. Aside from that the right of a tenant under a perpetual lease to take down buildings and rebuild and to alter, that is the principle upon which Jackson v. Brownson, 7 Johns. (N.Y.) 227, on p. 234.

remodel and reconstruct at his own pleasure will not be interfered with.<sup>36</sup>

**§ 442. Persons liable for waste.** At the common law an action for waste would lie against a tenant by courtesy or dower because these estates were created by an act of law,<sup>37</sup> but not against tenants created by contract. Hence in the absence of statutes and at common law tenant for life, or tenants at will, or tenants for a term of years were not liable for permissive waste.<sup>38</sup> By the statute known as the Statute of Marlbridge, 52 Hen. III, c. 23 s. 2, it was enacted that farmers who committed waste of anything belonging to their tenement without express permission in writing shall be responsible in damages to their landlord. And by a later statute known as the Statute of Gloucester, 6 Edw. I, c. 5, a writ of waste was expressly given against the tenant for life, a tenant for years, a tenant for the life of another person and against the assignee of tenants for life and years. In England it has been held that a tenant for one year or even for a half year is within the statutes.<sup>39</sup> And a tenant for one year and so on from year to year is certainly within this provision,<sup>40</sup> but a tenant at will or sufferance is not within the statutes and consequently, he is not liable in damages to his landlord for permissive waste.<sup>41</sup> Though for voluntary waste committed by him the landlord may put an end to the term.<sup>42</sup> An infant as well as an adult, who is in possession of premises as a lessee, may be enjoined in equity from using the premises in his possession so that they are wasted or so irreparable injury is caused to the owner of the premises.<sup>43</sup> So a postmaster to whom a building has been let as a postoffice, may be restrained from committing waste and neither the Post Master

<sup>36</sup> *Crowe v. Wilson*, 65 Md. 479, 482.

<sup>37</sup> *Greene v. Cole*, 2 Wms. Saund. 252.

<sup>38</sup> *Countess of Shrewsbury's Case*, 5 Coke, 13a.

<sup>39</sup> *Litt. S.* 67; 2 *Inst.* 302.

<sup>40</sup> *Doe d. Chadborn v. Green*, 9 *Ad. & El.* 658.

<sup>41</sup> *Boefer v. Sheridan*, 42 Mo. App. 226; *Harnett v. Maitland*, 16 *M. & W.* 204, Co. *Litt.* 57a; *Gib-*

*son v. Wells*, 1 *B. & P.* 290; *Countess of Shrewsbury's Case*, 5 *Coke*, 13a.

<sup>42</sup> *Countess of Shrewsbury's Case*, 5 *Coke*, 13a. If the landlord sues for voluntary or commissive waste he cannot recover for permissive waste. *Martin v. Gilham*, 7 *Ad. & El.* 540; *Harris v. Mantle*, 3 *T. R.* 307.

<sup>43</sup> *Cole v. Manners* (Neb. 1906) 107 *N. W. Rep.* 777.

General nor the United States are necessary parties.<sup>44</sup> Usually a subtenant may be restrained by injunction from the committing of waste.<sup>45</sup>

**§ 443. Tenant's liability for waste committed by others.** The tenant is liable in damages for waste committed by a person in his service or by any stranger upon the premises.<sup>46</sup> The lessor may pursue his action against the tenant who suffered the waste or against the stranger who in fact committed it. The tenant may be held liable to his landlord for waste where the act which is alleged to constitute the waste is committed by a stranger over whose conduct the tenant has no supervision or control. In this respect his liability assimilates to that of a common carrier who is liable for the value of goods he loses by having them taken or destroyed by an irresistible force. The tenant may be liable as for waste in case the premises are destroyed by a fire which has been kindled on the premises of another and by his negligence has spread to the buildings situated on the land demised. The tenant is liable for the conduct and neglect of the other, but has his remedy against him for damages.<sup>47</sup> The tenant who is sued for waste committed by a

<sup>44</sup> *Maddox v. White*, 4 Md. 72, 79. As to liability of a tenant by waste committed by his assignee, see *Donald v. Elliott*, 32 N. Y. S. 821, 24 N. Y. Civ. Proc. R. 190.

<sup>45</sup> *Peer v. Wadsworth*, 67 N. J. Eq. 190, 58 Atl. Rep. 379, 385. So a lessee may enjoin his sub-lessee from making alterations in the premises which would be a nuisance to other subtenants though he is neither owner of the land nor an occupant of the building. The right to the injunction is not destroyed by the fact that he has a legal remedy for a breach of the covenant. *Trénar v. Jackson*, 46 How. Prac. (N. Y.) 389, 15 Abb. Prac. (N. Y.) 115.

<sup>46</sup> *White v. Wagner*, 4 Har. & J. 373, 7 Am. Dec. 674; *Regan v. Luthy*, 16 Daly (N. Y.) 413, 11 N. Y. Supp. 709; *Powell v. Day-*

*ton, S. & G. R. R. Co.*, 16 Oreg. 33, 16 Pac. Rep. 863, 8 Am. St. Rep. 251; *Toleman v. Partbury*, 39 L. J. Q. B. 136, L. R. 5 Q. B. 288, 22 L. T. 33, 18 W. R. 579; *Nashville C. & St. L. Ry. Co.* (Tenn.) 79 S. W. Rep. 1038, 104.

<sup>47</sup> *Parrott v. Barney*, 18 Fed. Cases No. 10,773a, *Deady*, 405; *Powell v. Dayton*, *S. & G. R. R. Co.*, 16 Oreg. 33, 42, 16 Pac. Rep. 863. Every tenant whether for a term of years, or for life as by the courtesy or in dower must answer not only for waste by himself but also for waste by a stranger. He shall have his remedy over against the stranger either by an action at law for damages or to stop the waste by an injunction. *Attersoll v. Stevens*, 1 Taunt. 183; *Powell v. Dayton*, *S. & G. R. R. Co.*, 16 Oreg. 33, 42, 16 Pac. Rep. 863, 8

stranger has his remedy over against the stranger.<sup>47a</sup> But the tenant's right to recover from the stranger depends upon his first having satisfied the claim of his landlord by payment or by repairing the injured premises and in such event the stranger is liable only for the reasonable and necessary expenses incurred.<sup>48</sup>

**§ 444. Waste committed by a sub-tenant.** Though at law there is no privity of estate between a landlord and a subtenant of his lessee, yet in equity the subtenant who enters on land as such is chargeable with notice of all covenants in the lease relating to the use of the land. If there is an express

Am. St. Rep. 251; *Austin v. Hudson R. R. Co.*, 25 N. Y. 340, 4 Kent, Com. 77, 3 Black. Com. 228; *Cook v. Champion*, 1 Denio (N. Y.) 90. "If the law were not so, there would be no protection to a lessor where he lives at a distance from his estate. This is not the case of a sackfull of earth stolen by night, but many hands and carts must be employed, and the tenant must necessarily know it. When the lessor comes to see his estate, and finds the soil gone, it is impossible that he should know who took it. Suppose on a covenant not to take brick earth, the lessor sues finding a quantity gone? Is it an answer to say, 'I did not take it; a stranger—a beggar—took it, resort to him?' The law authorizes the tenant to use force in order to resist the taking, and, if the force is resisted by force, the law will not presume that the law is so feeble as not instantly to repel it and prevail." By Lord Masfield in *Attersoll v. Stevens*, 1 Taunt. 198, 202.

<sup>47a</sup> *Cook v. The Champlain Transportation Co.*, 1 Denio (N. Y.) 91, 104; *Attersoll v. Stevens*, 1 Taunt. 198, Coke Inst. 54a.

<sup>48</sup> *California Dry Dock Co. v. Armstrong*, 17 Fed. Rep. 216, 8

Sawy. C. C. 526. A tenant at will or at sufferance is not liable for waste committed by a stranger. *Coale v. Hannibal, etc., Co.*, 60 Mo. 227. A tenant whose employee maliciously and wantonly does an act which results in the destruction of or an injury to the demised premises is liable to the landlord. This was held in *Mason v. Stiles*, 21 Mo. 374, 64 Am. Dec. 342, where a clerk of the tenant, who carried on a store in the demised premises, placed an open can of powder on a counter in the store, and held a cigar over it from which sparks fell into the powder and the premises were destroyed. The rule that the master is liable for damages resulting from the willful wrong or trespass committed by his servants only where the wanton or negligent act is committed by the servant in the course of his employment was not applicable to this case as it was the duty of the tenant to take care of the house as in the case of an ordinary bailment and he could not shift this responsibility on a mere servant or employee. The wanton act of the clerk is an act of waste and for such an act by a servant the master who is a tenant is liable to his landlord.

covenant in the lease against waste, generally the subtenant will be bound thereby and the original lessor may enjoin him from a breach. The same principle applies to a case where there is a covenant against making alterations in the premises or against using them for a particular purpose. In such cases the original lessor has the same remedy in equity against the subtenant as he would have against an assignee or against any other purchaser with notice.<sup>49</sup> The tenant's agreement that he will not "make or suffer any waste or any unlawful, improper offensive use of said premises," means that he will not do this himself or permit it to be done by a subtenant.<sup>50</sup>

**§ 445. The landlord's remedy by injunction.** In addition to an action at law the landlord may obtain an injunction in equity to restrain any act of voluntary waste which the tenant contemplates.<sup>51</sup> Usually it is necessary in order that an injunction may issue that the landlord shall have no adequate remedy at law, or that it shall be shown that the tenant is insolvent or of insufficient means, and usually any act of voluntary waste, however trivial it may be, will be restrained by an injunction.<sup>52</sup> The landlord need not wait for his injunction or

<sup>49</sup> Peer v. Wadsworth, 67 N. J. Eq. 191, 58 Atl. 379, 382; Farrant v. Lovel, 3 Atk. 723.

<sup>50</sup> Miller v. Prescott, 163 Mass. 12, 39 N. E. Rep. 409. We are of the opinion that the agreement not to make or suffer an unlawful use of the premises must be interpreted as a stipulation that there shall be no unlawful use by the original lessee, or by any person who is occupying under him. It is easy for the lessee to control the use of the property, and to protect the interests of the lessor and of himself in this particular. With this interpretation effect is given to the word "suffer." It may not be reasonable to hold that the covenant makes the lessee liable for an unlawful use of the property by trespassers, but he may well be held to "suffer" an unlawful use of the

property if he does not take effectual measures to prevent such a use by those who occupy by his authority. The adjudication in Weaver v. Earle, 5 Cush. 31, fully covers the ruling now in question."

<sup>51</sup> Norway v. Rowe, 19 Ves. 154.

<sup>52</sup> Cole v. Manners (Neb. 1906) 107 N. W. Rep. 777; Palmer v. Young, 108 Ill. App. 252; Thruston v. Minke, 32 Md. 487, 497; George's Creek Co. v. Detmold, 1 Md. Ch. 372; Baugher v. Crane, 27 Md. 36; Maddox v. White, 4 Md. 72, 69 Am. Dec. 67; Atkins v. Chilson, 7 Metc. (Mass.) 298; Chapel v. Hull, 60 Mich. 167, 174, 26 N. W. Rep. 874; Parker v. Raymond, 14 Mo. 535; Perr v. Wadsworth, 67 N. J. Eq. 191, 58 Atl. Rep. 379, 382; Kidd v. Dennison, 6 Barb. (N. Y.) 9; Engle v. Thorn, 3 Duer (N. Y.) 15; Morrison v.

for any remedy until the waste is committed by the tenant, for if he can show to the court that the tenant is about to commit any act of waste which will operate as a permanent injury to the estate, a court of equity will at once interfere and restrain the tenant from doing such act.<sup>53</sup> Thus, the landlord may restrain his tenant from pulling down a house and building another which the landlord objects to,<sup>54</sup> or from making material alterations in a dwelling house as to changing it into a shop or warehouse.<sup>55</sup> The landlord may also restrain his tenant or a person claiming or holding under him or acting by his authority from putting the premises to uses which are inconsistent with the terms of the lease as well as from making material alterations for such purposes.<sup>56</sup> Generally it is waste for a tenant to remove structures erected by him on the premises which have become fixtures and he will be enjoined from so doing.<sup>57</sup>

Morrison, 122 N. Car. 598, 29 S. E. Rep. 901. (Waste by tenant in common.) Davenport v. Magoon, 13 Oreg. 3, 6, 4 Pac. Rep. 299, 57 Am. Rep. 1; Brock v. Dole, 66 Wis. 142, 145, 28 N. W. Rep. 334; Bass v. Metropolitan West Side Co., 82 Fed. Rep. 857, 863, 27 C. C. A. 147. The cases are not harmonious upon the question whether the landlord is entitled to enjoin the commission of waste in cases where he has an adequate remedy to recover damages at law. Some of the courts in holding that an injunction to restrain waste should be granted though the landlord had a legal remedy base their decisions upon the right of a covenantee to compel specific performance. Of course if there is an express covenant not to commit waste the landlord may compel the tenant to perform it by refraining from acts of waste and as a part of the remedy the court of equity may forbid the tenant by an injunction from doing those acts which he has expressly agreed not to do. Independently of ex-

press covenant not to do waste an injunction may be granted. It is not necessary to show irreparable injury or to prove and allege that the landlord has no adequate remedy at law. Peer v. Wadsworth, 67 Ct. J. Eq. 191, 200, 58 Atl. Rep. 379, 382. But it has also been held that an injunction will not be granted in the case of a mere trespass where the injury is not irreparable but is susceptible of perfect and adequate pecuniary compensation in damages to be recovered in an action at common law. Baugher v. Crane, 27 Md. 36, 39; Amelung v. Seekamp, 9 Gill & J. (Md.) 474.

<sup>53</sup> Brock v. Dole, 66 Wis. 142, 28 N. W. Rep. 334; Poertner v. Russell, 33 Wis. 193.

<sup>54</sup> Smythe v. Carter, 18 Beav. 78.

<sup>55</sup> Douglas v. Wiggins, 1 Johns. Ch. 435.

<sup>56</sup> Maddox v. White, 4 Md. 72, 79.

<sup>57</sup> Fortescue v. Bowler, 55 N. J. Eq. 741, 38 Atl. Rep. 445; Ware v. Ware, 6 N. J. Eq. 117; Douglass v. Wiggins, 1 Johns. Ch. (N. Y.) 435.

An injunction is peculiarly of value to prevent waste by a tenant of farm land. For where the character of farming land is materially changed or where it is put to improper use by the tenant, the landlord's remedy at law is inadequate by reason of the permanent injury which is done to the land. Thus, an injunction will be granted to restrain the tenant of farm land from cutting down timber and other trees and from plowing up meadow land.<sup>58</sup> And also from breaking up meadow land for the purpose of building thereon.<sup>59</sup> In all these cases of waste by farm tenants it will be presumed that the damages done to the farm are of such a nature that they cannot be compensated for, and in most cases the fact that the landlord may recover some damages for the injury done by the waste will not prevent the court from enjoining the attempted waste by the tenant. The remedy by injunction has in modern times been confirmed and established and has practically superseded not only the common law action of waste, but to a great extent, the action on the case for damages or an action on the implied covenant of a tenant not to commit waste.<sup>59a</sup> After waste has been committed by the tenant, an injunction may be granted to compel him to restore the premises and to put them in good condition under the direction of a master in chancery appointed by the court.<sup>60</sup> And it has been held that where a breach of a covenant is threatened and has been partly carried out, the court having jurisdiction to restrain the further carrying out of the breach will award damages in respect to the injury already done.<sup>61</sup>

**§ 446. The remedy by an action for damages.** The landlord whose property has been damaged by the tenant's waste may maintain an action against the tenant for damages. In

<sup>58</sup> Pratt v. Brett, 2 Madd. 62.

<sup>59</sup> Ld. Grey de Wilton v. Saxon, 6 Ves. 106; Kimpton v. Eve, 2 Ves. & Bea. 349.

<sup>59a</sup> Palmer v. Young, 108 Ill. App. 252.

<sup>60</sup> Klie v. Von Broock, 56 N. J. Eq. 18, 37 Atl. Rep. 468; Vane v. Lord Barnard, 2 Vern. 738; Rolt v. Somerville, 2 Eq. Cas. Abr. 739, in which the restoration of trees cut down was not compelled, but the restoration of houses and lead

pipes removed was compelled. The restorations must be promptly performed by the lessee as the lessor is not compelled to wait until the expiration of the term in order to have his property replaced in the condition it was when he left it. Agate v. Lowenstein, 57 N. Y. 604, 612.

<sup>61</sup> Hindley v. Emery, L. R., 1 Eq. 52; Barrett v. Blagrave, 5 Ves. 555. See Woodward v. Gyles, 2 Vern. 119.

most of the states an action is given by statute. Where no action is given by statute, the landlord may maintain action for damages by voluntary waste upon the implied covenant of the tenant to use the premises in a proper manner. If there is an express covenant against waste in the lease the landlord's remedy is on this covenant. The remedy by injunction, however, when it is available, is in all respects to be preferred to the common law remedy, but where it is not available the remedy by common law action must be resorted to. In some of the states of the Union the statute provides that if a tenant commits waste the landlord may have treble damages. A statute which gives treble damages where waste was wantonly committed is restricted in its application to voluntary waste and does not apply to permissive waste.<sup>62</sup> It has also been held where the statute is not express in its terms that whether damages shall be trebled is in the discretion of the court and that they should not be given where the wilfullness of the waste is not affirmatively established.<sup>63</sup> Where a statute does not provide for treble damages, the tenant who wilfully and wrongfully commits waste is chargeable with the highest probable or speculative value of the property wasted which may be reasonably warranted by the evidence, together with interest from the commission of waste.<sup>64</sup> He may, however, in mitigation of damages, show the actual proceeds derived by him from the sale of the property where his waste consisted in the removal of a building.<sup>65</sup>

**§ 447. The waiver of the right of the landlord to sue for waste.** The receipt of rent by the landlord or permitting the tenant to remain in possession after he has committed waste is not necessarily a waiver of the landlord's right to recover damages for waste,<sup>66</sup> or of his right to maintain trover or conversion

<sup>62</sup> Smith v. Mattingly, 96 Ky. 228, 28 S. W. Rep. 503; Danziger v. Silberthau, 18 N. Y. Supp. 350, 21 Civil Proc. Rep. 283.

<sup>63</sup> Isom v. Rex Crude Oil Co., 140 Cal. 678, 74 Pac. Rep. 294.

<sup>64</sup> Tate v. Field, 56 N. J. Eq. 35, 40 Atl. Rep. 206.

<sup>65</sup> Duke of Leeds v. Amhurst, 14 Sim. 357, 2 Phil. Ch. 117, 20

Beav. 239, 242, 246; Lushington v. Baldero, 15 Beav. 1; Seagram v. Knight (1867), 2 Ch. App. 628, 632; Morris v. Morris, 3 De Gex & J. 323; Jegon v. Vivian (1871), 6 Ch. App. 742.

<sup>66</sup> Chalmers v. Smith, 152 Mass. 561, 26 N. E. Rep. 95, 11 L. R. A. 769.

for timber taken from the land by the tenant.<sup>67</sup> So, also, even the voluntary surrender of the lease before the end of the term by an agreement of the parties based on a valuable consideration does not alone preclude the lessor from recovering damages for waste committed by the lessee.<sup>68</sup>

<sup>67</sup> *Brooks v. Rodgers*, 101 Ala. 111, 13 So. Rep. 386. "Where a tenant covenanted to make no alterations in the demised premises without written permission proof of the receipt of rent was received, though not conclusive that writ-

ten permission had been waived by the landlord." *Purton v. Watson*, 2 N. Y. Supp. 661, 19 N. Y. St. Rep. 6.

<sup>68</sup> *Marshall v. Rugg*, 6 Wyo. 270, 44 Pac. Rep. 700, 45 Pac. Rep. 486, 487, 33 L. R. A. 679.

## CHAPTER XX.

### THE USE OF THE PREMISES BY THE TENANT.

- § 448. The general rule as to the use of the premises by the tenant.
- 449. A covenant restraining use to one purpose does not prevent use for other proper purposes.
- 450. A covenant restricting the premises to use as a private dwelling or residence.
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- 452. Covenants against particular trades.
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- 466. Estoppel on the landlord to recover for improper use of premises.
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- 472. The knowledge of the lessor that the premises are to be used for an immoral or illegal purpose.
- 473. The leasing of premises for immoral purposes a crime.
- 474. Criminal liability of the landlord.
- 475. The construction of a statute providing for the equitable jurisdiction of leases for gambling purposes.

**§ 448. The general rule as to the use of the premises by the tenant.** The parties to the lease have the right to insert in the instrument of leasing any restrictions upon the mode in which the tenant may enjoy the property that they may see fit to agree upon provided that such restrictions are not contrary to public policy.<sup>1</sup> Aside from any express covenant in every lease there is, unless it is excluded by the operation of some express covenant or stipulation in the lease an implied obligation on the part of the lessee that he will so use the premises during the term as not unnecessarily to injure them.<sup>2</sup> The tenant may

<sup>1</sup> Round Lake Association v. Kellogg, 141 N. Y. 348, 355, 36 N. E. Rep. 326; Linwood Park Co. v. Van Dusen, 63 Ohio St. 183, 58 N. E. Rep. 576, 581 (holding that a provision that a house shall be used for a private dwelling only is valid); Hayward v. Rameg, 33 Neb. 836, 51 N. W. Rep. 229; Steward v. Winters, 4 Sandf. Ch. (N. Y.) 587, 590; Dodge v. Lambert, 15 N. Y. Super. Ct. (2 Bosw.) 570; Brouwer v. Jones, 23 Barb. (N. Y.) 153. See, also, Hodge v. Sloan, 107 N. Y. 244, 249; Tallmadge v. East River Bank, 26 N. Y. 105; Rowland v. Miller, 139 N. Y. 93; In Round Lake Association v. Kellogg, 141 N. Y. 348, on page 355, the court, by Bartlett, J., says: "It is quite clear the plaintiff (a camp meeting association) was entitled, in executing either a deed or a lease, to insist upon such covenants as to the use of lots sold or rented as would protect it in the management of its property in such manner as would be consistent with the object of its incorporation. The acceptance of the lease even without becoming a party to it was sufficient to render the lessee and his assignee subject to its terms and provisions as if they had signed it," citing At-

lantic Dock Co. v. Leavitt, 54 N. Y. 25; Bowen v. Beck, 94 N. Y. 86; Post v. West Shore R. R. Co., 123 N. Y. 580.

<sup>2</sup> Brooks v. Clifton, 22 Ark. 54, 561; Calmers v. Smith, 152 Mass. 561, 564, 28 N. E. Rep. 95, 11 L. R. A. 769; United States v. Bestwick, 94 U. S. 53, 24 L. ed. 65; Wilcox v. Cate, 65 Vt. 478, 481, 26 Atl. Rep. 1105. White v. Nicholson, 4 Scott (N. R.) 707; 4 Man. & G. 95; 11 L. J. C. P. 264. The description of a building in a lease as an apartment hotel does not imply an agreement that it should be used as such by a tenant. The words are merely descriptive intended solely to identify the building, and do not restrict the use of it by the tenant to hotel purposes. Bristol Hotel Co. v. Pegram, 98 N. Y. Supp. 512. The letting of a building for a particular purpose, with a prohibition in the lease, of its use and occupation for any other purpose, does not by implication raise a covenant on the part of the landlord, that the building shall continue fit for the purpose for which it is leased. Howard v. Doolittle, 3 Duer (N. Y.) 464. In United States v. Bestwick, 94 U. S. 53, the plaintiff sued for damages to a farm and the buildings thereon

devote the demised premises to any purpose and use he may see fit provided they are consistent with the use to which it has formerly been put, to which it is best adapted and for which it has been constructed.<sup>3</sup> On the other hand as has been said a covenant on the part of the tenant to use the demised premises

which had been leased by the Federal government as a hospital and camp ground during the Rebellion. While the government occupied the premises a main house was burned, shrubbery and many miles of fence torn down, a brick wall was torn down and the bricks used in building a house or shed, and shade and ornamental trees cut down, a stone wall torn down and carried away and stone and gravel quarried and also carried away. The court said: "But in every lease there is, unless excluded by the operation of some express covenant or agreement, an implied obligation on the part of the lessee to so use the property as not unnecessarily to injure it, or as it is stated by Mr. Comyn 'to treat the premises demised in such manner that no injury be done to the inheritance, but that the estate may revert to the lessor undeteriorated by the wilful or negligent conduct of the lessee. Com. Land. & Ten. 188. This implied obligation is part of the contract itself as much as if incorporated into it by express language. It results from the relation of landlord and tenant between the parties which the contract creates. Holford v. Dunnnett, 7 M. & W. 352. It is not a covenant to repair generally but to so use the property as to avoid the necessity for repairs as far as possible. Horsefall v. Mather, 7 Holt, 9; Brown v. Crump, 1 Marsh. 569. There are in this

contract no stipulations to take the place of or in any manner restrict this implied obligation on the part of the United States growing out of their relation to the petitioner as his lessees. They had the free and unrestricted right to, use the property for any and all purposes but were bound to so conduct themselves in such use as not to cause unnecessary injury. Whatever damages would necessarily result from a use by a good tenant must fall upon the lessor. All that the relation of landlord and tenant implies in this particular is, that the tenant, while using the property will exercise reasonable care to prevent damage to the inheritance. His obligation rests upon the maxim *sic utere tuo ut alienum non laedas*. If he fails in this, he violates his contract and must respond accordingly. The United States, when they contract with their citizens, are controlled by the same laws that govern the citizen in that behalf. All obligations which would be implied against citizens under the same circumstances will be implied against them. No lease in form was ever executed in this case; but the contract, followed by the delivery of possession and occupation under it is equivalent for the purposes of this action to a lease duly executed, containing all the stipulations agreed upon."

<sup>3</sup> Nave v. Berry, 22 Ala. 382.

in a tenantlike manner and without permitting or committing injury to the property will be implied.<sup>4</sup> And though the lease fails to restrict the lessee to the use of the premises for any particular purpose his action in altering them and using them for a purpose which is materially different from their former ordinary use may according to the circumstances constitute waste and result in such injury to the premises as will constitute a breach of his implied agreement for proper use.<sup>5</sup> Thus, a tenant who, having expressly hired the premises for the storage of merchandise therein, negligently or willfully places therein bulky and heavy articles by reason of which the premises fall down and are destroyed is liable in damages to his landlord,<sup>6</sup> upon the basis of his negligence in caring for the premises. The measure of care against accidents which the lessee must take during his occupancy of the premises to avoid responsibility to his landlord is that which a person of ordinary prudence and caution would use if his own interests were affected and the whole risk were his own.<sup>7</sup> The tenant must, in so far as the landlord is concerned, not only be free from negligence in his use of the premises, but he must also be free from willfully using them in such a way as to render them a nuisance to others.<sup>8</sup> He cannot be permitted to bind his landlord by any act which will prejudice the rights of the landlord so far as third persons are concerned. Thus, though he

<sup>4</sup> Nave v. Berry, 22 Ala. 382; R. A. 769; Shear v. Fisher, 27 Ill. Druhan v. Adam, 9 La. Ann. 527. App. 464.

<sup>5</sup> Nave v. Barry, 22 Ala. 382; Fogarty v. Junction City P. B. Co. 50 Kan. 478, 488, 31 Pac Rep. 1052, 18 L. R. A. 756; Hersey v. Chapin, 162 Mass. 176, 180, 38 N. E.

Rep. 482 (use of a house as a small-pox hospital); Independent Steam Fire Engine Co. v. Richland Lodge, No. 39 A. F. M., 70 S. Car. 572, 50 S. E. Rep. 499; Murrell v. Jackson, 33 La. Ann. 1342; Caffin v. Scott, 7 Rob. (La.) 205; New Orleans, etc., Co. v. Darns, 39 La. Ann. 766, 767, 2 So. Rep. 230.

<sup>6</sup> Brooks v. Clifton, 22 Ark. 54, 58; Chalmers v. Smith, 152 Mass. 561, 564, 26 N. E. Rep. 95, 11 L.

R. A. 769; Shear v. Fisher, 27 Ill. App. 464.

<sup>7</sup> Nitroglycerine Case, 15 Wall. (U. S.) 524, 21 ed. 206, affirming Parrott v. Barney, 18 Fed. Cases, 10,773, 1 Sawy. 423, 2 Abb. U. S. 197.

<sup>8</sup> A lessee of three story building who occupies the first floor with the privilege of subletting the upper floors as tenements has no right to license the use of the roof for advertising purposes, such as the erection thereon of large signs, where the latter are liable to become a nuisance and render the owner liable to litigation. O. J. Gude Co. v. Farley, 58 N. Y. Supp. 1036.

may have an easement for his own use as a right of way over adjacent land which is owned by his landlord, he has no right and cannot bind the landlord nor make it a public highway by granting the right to third persons to pass over the land of his landlord to their own premises.<sup>9</sup> The rules regarding the use of the premises which have just been stated, are particularly applicable where the tenant with or without the consent of the landlord annexes trade fixtures to the premises which he has a right to remove. He must use ordinary skill and care in removing them, and if he shall fail to do this, he will be responsible in damages to the landlord for his negligence.<sup>10</sup>

**§ 449. Covenant restraining use to one purpose does not prevent use for other proper purpose.** A covenant restraining the beneficial use of premises will not be raised by implication. Covenants and conditions in the lease restricting the use which a lessee may make of the premises, are generally construed strictly in his favor and their effect is never to be extended in tenantry to lie beyond the exact letter of their provisions. A tenant to whom a house is let for a particular purpose, and he devotes it to another purpose which is of such a nature that the house is destroyed by the unlawful acts of strangers, is liable to the landlord of the premises for waste. Thus where a house was let, for a dwelling-house and the tenant lived there, and distributed a paper of which he was the editor, by reason of which the house was attacked by a large multitude of unknown persons, who were incited to do so by the character of the paper, all of which the tenant has reasonable cause to expect would occur, he will be liable as for waste. The fact that he made preparations to resist the attack by assembling a number of men in the house, or that the civil authorities failed to give him assistance or protection will not excuse him. The basis of the reasoning of the decision is that he of his own authority and without the consent of

<sup>9</sup> Richardson v. Richardson, 9 Gray (Mass.) 213, 215.

<sup>10</sup> A railroad company occupying land under a lease may lay down rails upon it and use them as a track for its cars, engines, etc., unless expressly forbidden by the lease provided also that no waste is committed by so

doing. This differs essentially from an appropriation of the land under the right of eminent domain for the rails laid by the lessee must be taken up during the lease or, on its termination they become property of the lessor. Heise v. Pennsylvania R. Co., 62 Pa. St. 67, 73.

the landlord diverted the house to a totally different and much more dangerous purpose with the full knowledge of the risk which would arise therefrom.<sup>11</sup> So a stipulation in a lease that a store is "to be used and occupied only as a strictly first-class liquor saloon," does not prevent the use of the store for any legitimate business.<sup>12</sup> For it may be assumed that both parties knew that possibly no license could be obtained. The lease of a theatre building does not imply a covenant that the tenant will use it for theatrical purposes exclusively or for similar purposes. He has therefore the absolute right to use it for any lawful purpose, and to carry on any lawful business therein.<sup>13</sup> A provision that the leased premises shall, during the term, be "occupied for the same purposes as they now are" must be reasonably construed. The building is occupied for the same purposes where there is no essential and substantial alteration in the mode of its use and occupation.<sup>13a</sup> If it were used for a commercial purpose before the entry of the tenant he may continue to use it for the same purpose. A covenant that the premises shall be used by a tenant for a particularly specified purpose does not impliedly forbid that they may be used for another or similar lawful purpose, which is not injurious to the landlord's rights, unless such other use is expressly forbidden. The landlord unquestionably can have designated the sole and exclusive use to which the premises could be put by the tenant and he may then enjoin the tenant from permitting or committing a continuous breach of such covenant. He must however, do this by express words. Thus the words in a lease of a store "to be used as cabinet warerooms" following the description in a lease does not imply an agreement by the lessee not to use the premises as a store for the sale of general merchandise.<sup>14</sup> So, a covenant by a

<sup>11</sup> White v. Wagner, 4 H. & J. (Md.) 373, 392.

<sup>12</sup> Kerley v. Mayer, 10 Misc. Rep. 718, 31 N. Y. Supp. 818, 821.

<sup>13</sup> Taylor v. Finnigan, 189 Mass. 568, 572, 76 N. E. Rep. 203.

<sup>13a</sup> Shumway v. Collins, 6 Gray (Mass.) 227, 231, holding that the manufacture of carpet bags and of caps are identical purposes.

<sup>14</sup> Brugman v. Noyes, 6 Wis. 1, 11; see Macher & Foundling Hospital, 1 Ves. & B. 187; Kerley v. Mayer, 10 Misc. Rep. 718; Reed v. Lewis, 74 Ind. 433, 436, 440, 39 Am. Rep. 88, sustaining the general rule stated in the text. Compare *contra*, Farwell v. Easton, 63 Mo. 446, 449; Wertheimer v. Circuit Court, 83 Mich. 56, 62. In Hasbrook v. Paddock, 1 Barb. (N. Y.) 635, 642, and

lessee to use the premises as a private house does not imply that the lessee is restrained thereby from taking boarders.<sup>15</sup> So a house leased for use as a hotel may be used by the lessee as a seminary for young ladies.<sup>16</sup> A provision in a lease that the premises were let to the lessee for the purpose of his conducting therein a first class saloon does not prevent the lessee from carrying on therein any other legitimate business. It follows therefore from this fact that the passage of a local option law after the execution of the lease by which the keeping of a saloon in the leased premises became unlawful does not absolve the lessee from the payment of rent,<sup>17</sup> as he does not thereby lose the benefit of the possession of the premises as he may carry on another business therein or sublet them for any legitimate purpose.<sup>18</sup> A covenant or condition that the tenant would use the premises continually for a particular purpose, or that he will use them for a particular purpose without specifying also that it shall be continuous, must be reasonably construed. The most that can be implied from such an agreement, is that the tenant will not

was leased by the state for the purpose of digging and manufacturing salt thereon and the lessee leased a portion of the same for the erection of dwelling houses to be occupied by the employers and owners of the term in the salt land and it was held that this was a proper use of the land as it was necessarily incidental to the principal use which the tenant was allowed to make of it.

<sup>15</sup> Chautauqua Assembly v. Alling, 46 Hun (N. Y.) 582, 586;

<sup>16</sup> Nave v. Berry, 22 Ala. 382; *contra*, Gannett v. Albree, 103 Mass. 372, 374, where a covenant to use premises "strictly as a private dwelling and not for any public purpose" was held to be a covenant against a boarding house.

<sup>17</sup> San Antonio Brewing Ass'n v. Brentz (Vt. 1905), 61 Atl. Rep. 368. See also, Kerley v. Mayer, 31

N. Y. Supp. 818, 10 Misc. Rep. 718.

<sup>18</sup> A covenant to keep premises "clean" and not to occupy them for a saloon or a meat market. does not permit the tenant to use the premises for any business however foul by excepting a saloon or a meat market. The premises must be kept "clean" not only so far as the use of the premises would permit, or as clean as any business carried on therein would permit but absolutely clean. Clementson v. Gleason, 36 Minn. 102, 30 N. W. Rep. 400. A stipulation that the demised premises are to be used for "mercantile purposes and dwelling," will not permit the tenant to carry on a barber shop therein as such business is not a mercantile purpose. Cleve v. Mazzoni, 19 Ky. Law Rep. 2001, 45 S. W. Rep. 88.

voluntarily discontinue the particular use, and if by means beyond his control he is prevented from continuing the use specified in the lease, the landlord cannot take advantage thereof. Thus, if the use which the tenant covenants to make of the premises, becomes illegal or becomes impossible by reason of the action of the authorities, or by the act of God, the covenant and its responsibilities are at an end. He will not be compelled in equity to do a thing which is illegal or impossible. Thus, if he agrees to carry on a saloon in the premises and the liquor traffic is, during the term, forbidden by statute, and the premises are not adapted to any other purpose, his lease is at an end. So, also a covenant in a lease of a wharf that it shall be used in good faith, by the lessee continuously for the ordinary and usual business of a ferry to and from a city named is not broken by the fact that the lessee's ferry boat ceased to run for a month because it was levied on by a United States marshal where in the interval a schooner ran irregularly but carried all freight required to be carried.<sup>19</sup> A provision that the demised premises are to be occupied by the tenant for the sale of oilcloth and dry-goods, and that he will neither place nor permit signs to be placed at or about the entrance thereof which are not satisfactory to the landlord is broken by his conducting an auction business in the store, and by his placing an auctioneer's flag at the doorway. Even if there be no covenant in the lease that the premises are not to be used for any other purpose, the covenant just stated would be broken by the sale on the premises of any articles of merchandise not to be classified under the heading of oilcloths and dry-goods.<sup>20</sup> A covenant not to use the premises demised which were a theatre and opera house, for any but theatrical purposes and to use the best efforts of the lessee to improve the premises is not broken by the theatre being actually closed for two years, which of course was injurious to the prem-

<sup>19</sup> Heywood v. Berkely Land & Town Imp. Ass'n, 71 Cal. 349, 12 Pac. Rep. 232, 233.

<sup>20</sup> Weil v. Abraham, 66 N. Y. Supp. 244, 246, 53 App. Div. 313, following Steward v. Winters, 4 Sandf. Ch. (N. Y.) 587 in which it was held that a covenant that a store should be occupied for the

regular dry goods jobbing business and no other was broken by the sale of goods at auction in the store. The contention that the auctioning off of dry goods may be incidental to the dry goods business has no force as that is not the usual way of selling dry goods

ises as a theatrical property unless it also appeared that the lessee had voluntarily closed the theatre. If from financial difficulties he was unable to keep the theatre open there is no forfeiture. Another covenant bound the lessee of the theatre not to let stalls or boxes for a longer period than a year or season. The action of the lessee twelve days before the end of a season letting boxes for the next season the term to commence a day earlier than the expiration of a lease of the same boxes to another party for the preceding season, is no breach of the covenant as the lease was substantially a lease for only one season. In determining this question the court based its decision on the rule that a covenant restraining the common law power of a lessee to sublet was not to be construed in the same way as an enlarging power to let.<sup>21</sup>

**§ 450. Covenant restricting the premises to use as a private dwelling or residence.** It is competent and common for the lessor to restrict his lessee to the use of the premises as a private residence only.<sup>22</sup> A condition or covenant that a house shall be used only as a private dwelling is broken by the tenant carrying on, or permitting to be carried on, any trade or business in the house. The condition is broken though there has been no physical alteration of the premises to fit them for the carrying on of the business. A covenant to use the premises as a private house or dwelling only is broken by the tenant receiving persons as lodgers. For a house is not used as a private dwelling house or residence where the occupant takes in strangers as lodgers.<sup>23</sup> The covenant is broken by the tenant devoting the house to any use which opens its doors to the public or any considerable number of persons whether the tenant does or does not receive payment therefor from those who resort there and to whom service is rendered. Opening and carrying on a hospital, club or an orphan asylum in the premises would be a breach of the condition though the tenant is actuated purely by philanthropic motives in so doing and receives no pecuniary benefit from the institution which he has established in the premises. Some of the

<sup>21</sup> Croft v. Lumley, 5 El. & Bl. 648, 25 L. J. Q. B. 223, 2 Jur. (N. S.) 275, 4 W. R. 357.

<sup>22</sup> Schwoerer v. Connolly, 88 N. Y. Supp. 818.

<sup>23</sup> Hobson v. Tulloch, 67 L. J. Ch. 502; Linwood Park Co. v. Van Dusen, 63 Ohio St. 183, 58 N. E. Rep. 576.

courts give this covenant a very wide and inclusive meaning. Thus putting up a notice in the window of a dwelling house of a business nature is a breach of a covenant to use the premises for a dwelling house only, though no goods are in fact delivered there and the premises are otherwise used as a dwelling house.<sup>24</sup> On the other hand the fact that upon one occasion goods are sold in the house does not alone show that the covenant to use it as a private residence has been broken. Thus such a covenant is not broken by a sale by an auctioneer of the furniture in the house which sale takes place upon the premises.<sup>25</sup> But a covenant to use premises for a private dwelling only ought to be reasonably construed. So, the placing of a person in charge of his apartment as a caretaker by a tenant during his absence, without the landlord's consent is not a breach of his agreement that he will use such apartments as a private dwelling only, and shall not sublet without the consent of the landlord.<sup>26</sup> A stipula-

<sup>24</sup> Wilkinson v. Rogers, 10 Jur. (N. S.) 5, 9 L. T. 434, 12 W. R. 119, in which case both the lessee and the sublessee were enjoined from putting up the notice and from carrying on business in the premises.

<sup>25</sup> Reeves v. Cattell, 24 W. R. 485.

<sup>26</sup> Presby v. Benjamin, 169 N. Y. 377, 62 N. E. Rep. 430. The tenant of an apartment has as an appurtenant thereto an easement of way in the common halls which give access to the apartment. The unjustifiable refusal of the landlord to permit the tenant to exercise the right of access is an eviction. It is for the landlord to show justification. In Presby v. Benjamin, 169 N. Y. 377, the landlord claims that the attempt of the tenant to place his porter in possession of the apartment was in violation of the terms of the lease. "By virtue of his right to exclusive possession

which a tenant acquires by his lease he may use the premises in the same manner that the owner might have done except that he must not do any act to the injury of the inheritance. This right may be limited or qualified by the terms of the lease but it is not necessary for the tenant to show any particular provision of the instrument to justify his unlimited right to use and occupation; the landlord who denies it must point out the covenant which restricts the tenant's rights. The lease provides that the apartment shall be used as a private dwelling only. The tenant's action in no way tended to violate that covenant. The lease contained the further covenants that the tenant should not assign or sublet without the consent of the landlord under penalty of forfeiture. It is first to be observed that such covenants are restraints which courts do not favor. They

tion in a covenant that the premises shall be used as a dwelling house that they may be used as a shop "provided any of the adjoining premises are converted into a shop" permits the demised premises to be used as a shop where one of the adjoining houses is let to a photographer who exhibits and sells photographs and albums there but without making any alteration in the building. The conversion into a shop may be effected by the use of an adjoining house for the purpose of a shop though there has been no structural or architectural changes made in the building to fit it for the purpose.<sup>27</sup> In construing a covenant that the demised premises shall not be used for any business purpose unless adjoining premises are so used the court will not inquire whether the use of the adjoining premises was or was not permitted by the lease under which they were held or not. Under some circumstances a covenant on the part of the landlord, may be implied to the effect that the building of which the premises are a part, shall be used for residential purposes only. Thus, where the lease is of a flat or apartment, for a private residence only, and the circumstances show that the building in which it was situated was intended for and for a long time had been exclusively used for residential purposes only, it would be implied that the landlord binds himself to continue its use for that purpose. Equity will enjoin the landlord under such circumstances from converting a large portion of the building into a club house.<sup>28</sup>

**§ 451. Covenants against carrying on trade or business in the premises.** Covenants by the tenant not to carry on or exercise any trade or business in the premises, are negative in their character as distinguished from affirmative covenants to use the premises for private premises only. The former class of covenants are construed according to their spirit and intention rather than according to the strict meaning of language. The court will consider the general effect of the forbidden use of the premises as compared with the former use and will construe that to be a trade or business, which being carried on in the premises

are construed with the utmost jealousy and very easy modes have always been countenanced for defeating them." Riggs v. Pursell, 66 N. Y. 193.

<sup>27</sup> Wilkinson v. Rogers, 2 De G. J. & S. 62, 10 Jur. (N. S.) 162, 9 L. T. 696, 12 W. R. 284.

<sup>28</sup> Hudson v. Cripps, (1896) 1 Ch. 265.

deprives it of its character as a private dwelling, though the purpose of the forbidden use is not a commercial one, and the purpose with which the lessee carries on the forbidden occupation of the premises is not alone to make money, but is prompted in part at least by other motives.<sup>29</sup> For it is not essential that there should be a payment to constitute a business; nor does payment necessarily make that a business which without payment would not be a business. Hence a covenant that a lessee would not carry on any trade or business of any description is broken by the lessee carrying on a home for working girls where inmates were provided with food and lodging, whether they paid or not.<sup>30</sup> So a covenant by a tenant not to carry on in or upon the demised premises "any trade or business,"<sup>31</sup> or "not to exercise or carry on therein any art, trade or business, occupation or calling"<sup>32</sup> is broken by conducting a hospital in the premises which, though it was not established with a view to profit, requires patients to pay for nursing who are able and willing to do so. Nor will a prohibition against trade or business be restricted to the buying or selling of commodities by the lessee. Thus, a covenant by the lessee not to convert the premises into a shop or a public house or permit any person to carry on within or upon the dwelling house or premises any public trade or business whatsoever, and that the premises should be used as a private house is broken by their use as a school for young ladies, where dancing and music are taught in connection with literary studies.<sup>33</sup> A covenant by a lessee not to use or exercise or permit or suffer to be used or exercised, upon the premises any trade or business whatsoever, without the consent of the lessor, is broken by an assignee of the lessee carrying on a school in the premises.<sup>34</sup> A provision in a lease which forbids the tenant to

<sup>29</sup> A condition that the tenant shall not cease to use the house as a dwelling, is reasonable.

Marsh v. Bristol, 65 Mich. 378.

<sup>30</sup> Rolls v. Miller, 53 L. J. Ch. 682, 27 Ch. D. 71, 50 L. T. 597, 32 W. R. 806 affirming 48 J. P. 357, 518.

<sup>31</sup> Bramwell v. Lacey, 48 L. J. Ch. 339, 10 Ch. D. 691, 40 L. T. 361, 27 W. R. 463.

<sup>32</sup> Portman v. Home Hospitals Association, 27 Ch. D. 81n, 50 L. T. 599n.

<sup>33</sup> Wickenden v. Webster, 5 E. & B. 387, 25 L. J. Q. B. 264, 2 Jur. (N. S.) 590, 4 W. R. 562; see also Johnstone v. Hall, 2 K. & J. 414, 25 L. J. Ch. 462, 2 Jur. (N. S.) 780.

<sup>34</sup> Doe d. Bish v. Keeling, 1 M. & S. 95, 14 R. R. 405; Kemp v.

convert the premises into a shop or office "or affix or permit any outward mark or show of business to be affixed thereon" is broken by the tenant putting a wire screen and a roller blind in his window on which the name of a business firm is inscribed and a brass plate with a firm name on the railing in front of the same.<sup>35</sup>

**§ 452. Covenants against particular trades.** Covenants are frequently inserted in leases forbidding the lessee to carry on some particular trade or occupation. Such covenants are necessary not only to protect the premises from injury which might otherwise be done them, but also to preserve their respectability, and the good will which is thereby attached to the premises. These covenants usually run with the land, and as a legal remedy for the recovery of damages, is usually inadequate, they will be protected by injunction.<sup>35a</sup> A covenant on the part of the lessee agreeing not to carry on a particular trade in the demised premises, should receive a reasonable construction. The presumption is against extending the effect of such a covenant, but on the other hand, if the business actually carried on by the lessee is of a similar nature and productive of the same effect as that which is prohibited, the covenant is broken though it be not precisely similar in every respect.<sup>36</sup> In order that there shall be a breach of a covenant forbidding a particular trade from being carried in the premises it is not necessary that the tenant shall carry on every branch of the trade there. It will be sufficient if the tenant partly carries it on there. It is not usually material to what extent or in what manner a business absolutely and expressly prohibited in the demised premises is carried. The object

Sober, 1 Sim. (N. S.) 517, 20 L. J. Ch. 602, 15 Jur. 458.

<sup>35</sup> Evans v. Davis, 48 L. J. Ch. 223, 10 Ch. D. 747, 39 L. T. 391, 27 W. R. 285. As to permitting auction sales on the premises carried on by others than the tenant. See Toleman v. Portbury, 39 L. J. Q. B. 136, L. R. 5 Q. B. 288, 22 L. T. 33, 18 W. R. 579.

<sup>35a</sup> Wertheimer v. Circuit Court, 83 Mich. 56.

<sup>36</sup> See Parker v. Whyte, 1 H. &

M. 167, 32 L. J. Ch. 520, 8 L. T. 446, 11 W. P. 683; (covenant against auction sales) Clements v. Welles, 11 Jur. (N. S.) 991, 14 W. R. 187; Wilson v. Hart, 35 L. J. Ch. 596, L. R. 1 Ch. 463, 12 Jur. (N. S.) 460, 14 L. T. 499, 14 W. R. 748; Maunsell v. Hart, 1 L. R. Ir. 88; Hodson v. Coppard, 7 Jur. (N. S.) 11, 9 W. R. 9; Fielden v. Slater, 38 L. J. Ch. 39, 379, L. R. 7 Eq. 523, 20 L. T. 112, 17 W. R. 485

in all cases of prohibited trades is to prevent the lowering of the character of the houses by the exercise in them of certain trades or occupations wholly or in part which in the judgment of the landlord are likely to prevent tenants from afterwards taking the premises and which will depreciate or tend to depreciate the value of the houses at some future period.<sup>37</sup> The sale by a hosier in the ordinary course of his business of certain articles which are usually sold by ladies' outfitters is not a breach of his covenant not to carry on the business of a ladies' outfitter even if the articles sold by him form a substantial part of the business of a ladies' outfitter.<sup>38</sup> A covenant in a lease not to carry on the trade of a butcher in the premises means a retail butcher and is broken by the lessee selling raw meat at retail though no beasts were slaughtered on the premises.<sup>39</sup> A covenant by the tenant not to use the demised premises as a coffee house is broken by the sale by him of cups of tea and coffee with bread and cheese and other light refreshments, incidental to the sale on the premises of coffee and tea in packages to grocers.<sup>40</sup>

**§ 453. Covenants by the lessor against carrying on competing business.** An owner of property may lease it to another person for a particular mercantile purpose and the lessor may covenant in the lease that he will not engage in a similar business during the term. Where one leased a stone quarry, upon the consideration that the lessee would pay him a certain sum for all stone produced, and the lessor agreed not to engage in the same business during the term this covenant by the lessor is material and is the principal object of the lease. If the lessor breaks such a covenant and engages in a similar business, the lessee may elect whether to continue in possession or not. The breach of the covenant by the lessor releases the lessee from all his obligations. He may rescind the lease, paying for the stone removed by him and surrender the lease.<sup>41</sup> So, too, it is permis-

<sup>37</sup> Doe d. Gaskell v. Spry, 1 B. & Ald. 617, 619, 19 R. R. 404; Doe d. Bish v. Keeling, 1 M. & S. 35.

<sup>38</sup> Stuart v. Diplock, 59 L. J. Ch. 142, 43 Ch. Div. 343, 62 L. T. 333, 38 W. R. 223,

<sup>39</sup> Doe d. Gaskell v. Spry, 1 B. & Ald. 617, 619, 19 R. R. 404.

<sup>40</sup> Fitz v. Iles, 62 L. J. Ch. 258, (1893) 1 Ch. 771, 2 R. 132, 68 L. T. 108, following Buckle v. Fredricks, 44 Ch. Div. 244, and distinguishing Stuart v. Diplock, 43 Ch. Div. 343.

<sup>41</sup> Dishman v. Huetter, 41 Wash. 626, 84 Pac. Rep. 590, 591. The recognition and enforcement in equity of agreements or cove-

sible and not in absolute restraint of trade for the lessee to stipulate that he will not manufacture upon the demised premises, articles of merchandise which will compete with the sale of those the lessor is manufacturing on his premises.<sup>42</sup> It is also proper and valid for a lessee to stipulate that he will not carry on or permit or suffer another person to carry on in the demised premises any trade, profession or business that will compete with that carried on by the lessor in such premises or elsewhere. Such a covenant by the lessee is valid notwithstanding an absolute restraint of trade. So covenant restraining a lessor from leasing other portions of the building described in the lease to persons carrying on a business which will compete with that of the lessee will be strictly construed both at law and in equity. It is a covenant not only in partial restraint of trade but also restrains alienation and, as such, it will not be favored particularly in this country where land and buildings thereon have become to so large an extent articles of active commerce. The tendency of such a covenant is to create a monopoly in the hands of the lessee and to work a detriment to the public by preventing competition while at the same time it is an incumbrance upon the reversion in the hands of the owner and so far as it effectually restrains its use or sale, takes it out of the market and thus increases the demand however slightly, by diminishing the supply. If there is any doubt in the meaning of such a covenant and the actual intention of the parties to the lease is inascertainable, the doubt must be resolved adversely to the restriction upon the use of the premises.<sup>43</sup> Though covenants restraining a landlord from

nants by which a lessee or owner of lands is restricted in their use in the interest of other lands owned by the covenantor has found a general recognition in courts of equity in this country and the doctrines applicable to such covenants, easements or servitudes is thoroughly established in accord with that of the English courts. Jones, Real Property, § 780; Barrow v. Richard, 8 Paige, 351; Trustees v. Lynch, 70 N. Y. 440; Hodge v. Sloan, 107 N. Y. 244, 17 N. E. Rep. 335;

Whitney v. Railway, 11 Gray (Mass.) 359; Morris v. Manufacturing Co., 83 Ala. 565, 3 So. Rep. 680; Stines v. Dorman, 25 Ohio St. 580.

<sup>42</sup> American Strawboard Co. v. Haldeman Paper Co., 27 C. C. A. 634, 83 Fed. Rep. 619, 630.

<sup>43</sup> Postal Telegraph Cable Co. v. Western Union Telegraph Co., 155 Ill. 335 348, affirming 51 Ill. App. 62. "The covenant prohibits the lessor from leasing any of the offices in said building for a telegraph office to be used by anoth-

carrying on a competing business are strictly construed against a tenant, it has been held that a covenant by a landlord not to sell goods which will compete with the business of his tenant, is broken by the landlord permitting others to do so on premises owned by him.<sup>44</sup> And a covenant by the landlord binding him not to permit or to suffer to be carried on a competing business on adjoining premises is broken by the landlord leasing the adjoining premises to another person who carries on such a business. Under such circumstances in one case an injunction was issued by the English court of equity, against both the landlord and the second tenant, restraining them from a continuous breach of the landlord's covenant.<sup>44a</sup> But an entirely different doctrine was laid down in a case where the landlord had covenanted with his lessee not to let adjoining premises for a competing business. It was deemed that the landlord had fulfilled his covenant to the first lessee where he inserted a covenant in the second lease which bound the second lessee not to carry on a competing business. The distinction was made between a covenant not to let premises for a competing business and a covenant not to carry on or permit a competing business. A covenant by a lessor not to let the adjoining premises for a trade to which the lessee is restricted is not broken by the user of the adjoining premises by another lessee in breach of a covenant contained in

er company, and is therefore in restraint of a beneficial use of the real estate. Restrictions on the power of alienation have long been unfavored, and the policy of this state has ever been hostile to them, and this principle is so firmly engrafted on our polity that such covenants will be construed with the utmost strictness, to the end that the restraint shall not be extended beyond the express stipulation; and all doubts as a general rule, must be resolved in favor of a free use of the property and against restrictions. This principle has come to be the settled rule of most of the states, as it is also of England. Hutchinson v. Ulrich, 145

Ill. 336; Eckhart v. Irons, 128 Ill. 568; Boyd v. Fraternity Hall Ass'n, 16 Ill. App. 574; Livingston v. Stickles, 7 Hill (N. Y.) 253; Brugman v. Noyes, 6 Wis. 1; Cru-soe v. Bugby, 2 W. Bl. 776; 1 Washburn on Real Prop., 317; Taylor on Landlord and Tenant, § 402; 4 Kent's Com. 131." By the Court in Postal Telegraph Cable Co. v. Western Union Tel. Co., 155 Ill. 335, on page 348, affirming 51 Ill. App. 62, S. C. 40 N. E. Rep. 587.

<sup>44</sup> Herpolsheimer v. Funke, (Neb. 1901), 95 N. W. Rep. 688.

<sup>44a</sup> Holloway v. Hill, (1902) 2 Ch. 712, 87 Law T. 201, 71 Law J. Ch. 818.

his lease. The lessee under the first lease has no right to enforce such a covenant or to compel the lessor to enforce it. The lessor is not a trustee of his lessee to the extent that he must sue to enforce the covenant which is being broken at the risk of being responsible in damages for a breach of a covenant contained in the other lease to the other tenant. As the landlord has broken no covenant he cannot be sued or enjoined by his tenant nor can the first tenant sue or enjoin the other tenant of the landlord as there is no privity between them.<sup>45</sup> A tenant who has hired a portion of certain premises to be used in carrying on a particular business to which he is restricted by the lease, and with whom the landlord has in the lease expressly covenanted that he will not demise any other portion of the same premises for a competing business has no remedy against a subsequent tenant of the same landlord, who is carrying on a competing business. If the first tenant shall treat the letting to the second tenant as an existing fact and, by failing to attack its validity, neglect to impeach it, he cannot enjoin the second tenant from carrying on the business, inasmuch as the conduct of the second tenant in carrying on the business is not a breach of the landlord's covenant not to demise any other portion of the premises for a competing business. The first tenant may as against his landlord show in equity that the letting was a breach of the landlord's covenant and he may have an inquiry to ascertain his damages with liberty to apply for an injunction in case there should be any further letting in violation of the landlord's covenant.<sup>46</sup> The words "adjoining premises" in a covenant by a landlord not to carry on or allow a certain trade to be carried on, in "adjoining premises" means the two houses on either side of the demised premises, though the landlord was at the time of the lease the owner of a whole block of buildings of which these with the demised premises formed a part only.<sup>47</sup> There is very little authority on this question among the American cases but

<sup>45</sup> *Kemp v. Bird*, 46 Law J. Ch. 828, 5 Ch. Div. 549, 974, followed. *Fitz v. Iles*, 62 Law J. Ch. 258, (1893) 1 Ch. 77, discussed.—*Ashby v. Wilson*, 69 Law J. Ch. 47, (1900) 1 Ch. 66, 81 Law T. (N. S.) 480, 48 Wkly. Rep. 105.

<sup>46</sup> *Brigg v. Thornton*, 73 L. J.

Ch. 301, (1904) 1 Ch. 386, 90 L. T. 327, 52 W. R. 276, applying *Kemp v. Bird*, 46 L. J. Ch. 828, 5 Ch. D. 549, 974.

<sup>47</sup> *Vale v. Moorgate Street & Broad Street Buildings*, 80 L. T. 487.

in one instance at least the English rule has been followed. In Maryland it has been held that a covenant by the lessor not to lease any other portion of his premises than that leased to the lessee for a purpose which will compete with the use that is made of it, is not broken by a lease for a different purpose, the lessee under which without authority from the lessor, and without paying him anything therefor carries on a competing business.<sup>48</sup> In New York the courts have held the landlord to a very strict responsibility upon his covenant not to let premises for a business which will compete with that of his tenant. Thus the action of the landlord in renting a part of the premises "to be used by the tenant as one of its branch grocery stores, and for no other purpose" is a breach of a covenant by the landlord with a former tenant not to rent parts of the premises for the purpose of dealing in cigars and tobacco at wholesale and retail when the new tenant sells cigars and tobacco in connection with his grocery business. This is a negative covenant. The landlord may be enjoined from letting other portions of the premises for any prohibited business, though it was to be carried on in connection with a business of another and non-competitive character.<sup>49</sup> An injunction will be granted on the application of a tenant to enforce a covenant by which the landlord agreed not to rent adjoining premises for the same business as that conducted by the tenant. Both the landlord and the tenant who carries on the competing business are proper parties to be enjoined.<sup>50</sup> A covenant in the lease restricting the use of a particular piece of land retained by the landlord on the making of the lease may be enforced in equity by any person who is entitled in equity to the benefit of the covenant against any person, who takes the adjoining land the use of which is restrained, with equitable notice of the covenant. Such notice may be either expressed or implied. The notice may arise from facts and circumstances sufficient to excite one's caution. Thus where the use of adjoining land is restrained by a covenant in the lease en-

<sup>48</sup> *Lucente v. Davis*, 101 Md. 526, 61 Atl. Rep. 622.

<sup>49</sup> *Waldorf-Astoria Segar Co. v. Salomon*, 184 N. Y. 584, 77 N. E. Rep. 1197, affirming 109 App. Div. 65, 95 N. Y. Sup. 1053.

<sup>50</sup> *Waldorf-Astoria Segar Co. v. Salomon*, 95 N. Y. Supp. 1053, 109 App. Div. 65, affirmed in 184 N. Y. 584, 77 N. E. Rep. 1197.

tered into by a landlord, who owns the adjoining land, a subsequent lessee of such land may be enjoined from putting it to the prohibited use. This a purely equitable proceeding and remedy depends neither upon a covenant running with the land nor on any right to relief at the common law. Thus where a lease of several stores bound the landlord not to permit or to suffer to be carried on adjoining premises a particular kind of business and the landlord subsequently leased one of the shops to be occupied by a tenant for the purpose of the prohibited business, the first tenant was granted an injunction against the lessor and the subsequent lessee restraining both from the carrying on of the business.<sup>51</sup>

**§ 454. Covenants forbidding the use of the premises for offensive trades.** Aside from the obligation on the part of the tenant, to use the premises for proper purposes, it is competent for the parties to the lease to covenant in express terms that they shall not be used for any offensive trade or business, or for any purposes which shall tend to become an annoyance or damage to the lessor. Aside from such a stipulation, the landlord has no remedy at law against his tenant who uses the premises for a purpose which tends to be obnoxious, unless he can prove actual damages to his property by reason of such use. In so far as an improper use of the premises constitutes a public nuisance, the tenant who maintains the nuisance will be liable to those who are injured thereby, and the landlord will not be liable unless either a nuisance existed on the premises when he leased them, or subsequently thereto he was instrumental in creating it. If the landlord shall desire to protect himself against the consequence of an improper use of his premises not amounting to actual waste, he must do so by covenants in the lease, and if he does this, he can secure the performance of such covenants in equity, or he can enforce a forfeiture if the restrictions on the use are in their nature conditions subsequent. A distinction is made between a covenant by a lessee not to carry on any offensive trade, and a covenant not to carry on any offensive business upon the premises. Every trade is a business but not every

<sup>51</sup> Holloway v. Hill, 71 L. J. Ch. 46 L. J. Ch. 828, 5 Ch. D. 540, 974, 818, (1902) 2 Ch. 712, 87 L. T. Fitz v. Iles, 62 L. J. Ch. 258; 201. In this case these authorities are reviewed. Kemp v. Bird, (1893) 1 Ch. 77.

business is a trade. Trade involves buying and selling. Hence a covenant not to "use or exercise any trade or business of butcher, baker, slaughterman, melter of tallow, tobacco-pipe maker, soap-boiler or any other offensive trade" does not prevent the conversion of the demised premises into a lunatic asylum.<sup>52</sup> The use of the premises for such a purpose while it may be offensive is not a use for a trade. Some trades or modes of using the premises are *per se* offensive as a matter of law though properly conducted. The establishment of a hospital for the treatment of out door patients suffering from diseases of the eye, throat and the like is a breach of a covenant not to do any act "which shall, or may be, to the annoyance, nuisance, grievance or damage of the lessor, his heirs or assigns or the inhabitants of the neighbouring houses" and will be restrained by injunction. It is not necessary in order to secure the enforcement of this covenant that actual damage or pecuniary loss has been sustained. It is sufficient, without proving the actual risk of infection, that sensible people feel a reasonable apprehension of risk, on that account and interference with the pleasurable enjoyment of their houses for ordinary purposes, as distinguished from a mere fanciful feeling of distaste entertained by sensitive persons.<sup>53</sup> Again other trades or kinds of business are not offensive or obnoxious *per se* if properly carried on but may become so by reason of lack of proper precaution in carrying on such trade or business. A covenant against occupancy by the lessee for a trade or business which is likely to become offensive, or to be an annoyance to other occupants or tenants, does not prevent a lessee or his subtenant from carrying on a public house and the business of a licensed victualler in the premises. For a public house is not either a nuisance *per se* nor is it likely to become such if it be properly carried on. Such a businss may be a necessity in many cases. If it is properly conducted, it may be from a business standpoint of considerable advantage to the vicinity.<sup>54</sup> Where the facts and circumstances are in issue, whether any particular trade or business is included within the

<sup>52</sup> Doe d. Wetherill v. Bird, 4 N. & M. 285, 289, 2 A. & E. 161, 4 L. J. K. B. 52.

L. J. Ch. 83, 40 Ch. D. 80, 60 L. T. 241, 37 W. R. 38.

<sup>53</sup> Tod-Heatley v. Benham, 58

54 Jones v. Thorne, 3 Dow & R. 152, 1 B. & C. 715, 1 L. J. (O. S.) K. B. 200, 25 R. R. 546.

scope of a covenant by a tenant not to carry on or permit an offensive business or trade to be carried on in the premises is usually a question of fact. Though the business of frying fish is not of necessity an offensive trade or business coming within the provision of a covenant by the tenant not to use the premises "for carrying on any offensive trade whatsoever" yet such business may become an offensive trade in connection with the manner in which it is carried on.<sup>55</sup> And in determining whether a trade is offensive or not the court will be bound to take into consideration the location and character of the demised premises. So, a provision in a lease that the premises should be delivered upon notice, by the lessee if he became obnoxious or objectionable, by reason of any cause whatever, gives the lessor the right to the possession on notice where the tenant conducts his business so noisily, as to make the carrying on of business by the lessor in another portion of the premises, impossible.<sup>56</sup>

**§ 455. Covenants against the sale of liquors on the premises.** Where the use of the premises is by the lease expressly restricted to a certain purpose, a covenant by the lessee will be implied not to use them for the sale or manufacture of liquors wholesale or retail. So, an injunction will be granted in equity to restrain the use of premises for a saloon which were leased for a grocery store,<sup>57</sup> or for a studio, salesroom or dwelling-house.<sup>58</sup> An express covenant not to use the premises as a public house, or for a saloon, or for the sale of liquors, is strictly construed in favor of the lessee. Thus the lessee's covenant that neither he nor his assigns will sell intoxicating liquors on the premises is not broken by his assignee granting a sublease of the premises to one who proposes to carry on a saloon therein and their use as such.<sup>59</sup> But a covenant by the lessee not to use or to permit the premises to be used as a saloon, or a covenant not to sell or to permit to be sold intoxicating liquors on the premises is broken by the sale of intoxicants on the premises by a subtenant.<sup>60</sup> A covenant not to use the premises as a public

<sup>55</sup> Devonshire (Duke) v. Brookshaw, 81 L. T. 83, 63 J. P. 569.

<sup>58</sup> Bryden v. Northrup, 58 Ill. App. 233.

<sup>56</sup> Adams v. Clark, 2 W. N. C. (Pa.) 429.

<sup>59</sup> Granite Building Corp. v. Greene, 25 R. I. 586, 57 Atl. Rep. 649.

<sup>57</sup> Jalageas v. Winton, 119 Ill. App. 139, 145.

<sup>60</sup> In the case of Granite Build-

house, tavern or beerhouse is not broken by using them as a grocery store in which beer is sold to be drunk off the premises.<sup>61</sup> Nor would such covenant be broken by wholesale trading in liquor in the pure or by the use of the premises as a pharmacy with the incidental sale of liquors for medicinal purposes. A covenant not to use the premises for the sale of liquors in a lease of premises to a club permits the purchase of liquor and its distribution at fixed prices among the members the profits being applied to the general purposes of the club.<sup>62</sup> The covenant was evidently intended to prevent the use of the premises as a mere tavern or the general sale of liquors to the public.

**§ 456. The use of the premises by the lessee for hotel purposes.** Various restrictions upon the conduct of the tenant in dealing with the demised premises are often inserted by the parties in the lease of premises which are let for hotel purposes or as public houses. These restrictions have usually for their object the limiting of the power of the tenant to purchase liquors or other merchandise used or sold by him to one particular person or firm, who in most cases, is the landlord. Other covenants in leases of hotels, inns and public houses are meant to secure the conduct of the tenant's business in an orderly and proper legal manner. A covenant by the lessee that he will purchase all

ing Corp. v. Greene, 25 R. I. 586, 57 Atl. Rep. 649, 652, held that though a covenant not to sell liquor on the premises ran with the land it was not binding on a sub-tenant. The theory of the lessor in this case was that the assignee by permitting the sub-tenant to sell liquor broke the lease and incurred a forfeiture. The court held that the assignee had not broken the lease by the conduct of the sub-tenant stating that after a search of the precedents the court had been unable to find any case in which a forfeiture had been sustained on account of the act of a subtenant in violation of the restriction of the mode of enjoyment unless the tenant had made himself liable for

such act by the use of the word suffer or permit or some such general word assuming the duty of preventing the obnoxious act.

<sup>61</sup> Holt v. Collyer, 50 L. J. Ch. 311, 16 Ch. D. 718, 44 L. T. 214, 29 W. R. 502, 45 J. P. 456; Pease v. Coats, 12 Jur. (N. S.) 684, 14 L. T. 886, 14 W. R. 1021; London and N. W. Railway Co. v. Gairnett, 21 L. T. 352, L. R. 9 Eq. 26, but compare *contra* where the covenant was not to use the premises as a beershop. Bishop of St. Albans v. Battersby, 47 L. J. Q. B. 571, 3 Q. B. D. 359, 38 L. T. 685, 26 A. R. 678, in which the distinction was between a beerhouse and a beershop.

<sup>62</sup> Ranken v. Hunt, 10 R. 249.

goods sold on the demised premises during the term from the lessor exclusively is unquestionably valid. In England it is customary for brewers to acquire the ownership of the reversion of premises occupied as beer houses or public houses and to lease the same with an agreement on the part of the lessees in substance that the lessees will purchase their beer exclusively from the lessors. A public house occupied by a lessee under such a lease is called a "Tied house." Leases of this character have often been construed, particularly where the business carried on in the premises has been assigned by the tenant, or where the reversion has been assigned by the owner. Speaking generally a provision of this kind will run with the land.<sup>63</sup> It has been held that a provision of this kind by which the lessee expressly covenanted that he would not sell any beer on the premises except that purchased from the lessor, or from some person who might thereafter become a partner of the lessor, was not limited in its benefit, to an assignee of the lessor who should carry on the lessor's business at the lessor's brewery, but the benefit of it ran with the reversion to a person who carried on the business of a brewer elsewhere and who had become the owner of the reversion.<sup>64</sup> But on the other hand, where the provision was that the tenant must purchase his beer from the lessor or his firm, or his successor in business, it was held that a brewing company to whom the lessor had assigned the reversion, but which had not however purchased the lessor's business, could not compel its tenant to buy all his beer from it, particularly as the lessor, after the assignment, continued to carry on the business of a brewer.<sup>65</sup> In the United States, particularly in the large cities in cases where brewers are the owners of hotel premises leased to tenants, similar covenants restricting the tenant from purchasing from others than his landlord are common. From the fact that little if any litigation has arisen in connection with such covenants their validity may safely be assumed. In a recent case in Wisconsin such a covenant was construed. It was held that a lease which provides that no beer except that made by a particular manufacturer shall be sold upon the premises, if

<sup>63</sup> Clegg v. Hands, 62 L. T. 502, 42 Ch. Div. 503.

<sup>65</sup> Birmingham Breweries v. Jameson, 67 L. J. Ch. 403, 78 L. T.

<sup>64</sup> Clegg v. Hands, 62 L. T. 502, 42 Ch. Div. 503.

512; C. A. reversing, 46 W. R. 375.

founded upon a sufficient consideration is valid and legal. The fact that the landlord with whom the covenant is made is a member of a trust or combination which has been formed for controlling the trade in the particular article, has no effect whatever in preventing the landlord from enforcing the restrictive agreement. So, also, the fact that the beer which is permitted to be sold upon the premises cannot be lawfully obtained by the lessee is no defense in an action to restrain the tenant, if the fact that the beer could not be obtained was actually known to the parties to the lease at the time it was executed. So long as the lessee shall remain in possession he must comply with the covenant unless he shall be relieved from its operation by a court of equity.<sup>66</sup> A covenant by the lessee that he will at all times during the term so conduct the premises which were leased to him as a licensed public house as to afford no reasonable ground for a refusal of a renewal of the license is broken by the conduct of a sub-tenant of the assignee of the lessee who so conducts the business that a new license is refused him, in consequence of which the value of the premises as a licensed public house is greatly diminished, or destroyed. This covenant is an absolute one and is to the effect that the lessee and his assigns will not do a certain thing. Such a covenant regulating the use of the property, would certainly run with the land, whether the word "assigns" was in it or not. The undertenant under such circumstances may be regarded as an assignee, or if this be not the true theory then he is liable in any case because the covenant runs with the land and because the undertenant takes the premises subject to the covenants which are binding on his lessor.<sup>67</sup> Such a covenant is clearly to be distinguished from one in which the lessee agrees that he will not do anything "*willfully*", which will alter the use or condition of the premises which are a public house or that he will not "*willfully*" do or suffer any act which will subject him to the loss of his license. An act which causes the loss of the license done by an undertenant cannot be held to have been done "*willfully*" by the lessee.<sup>68</sup> A covenant by a

<sup>66</sup> *Jos. Schlitz Brewery Co. v. Bryant v. Hancock*, 67 L. J. Q. B. Nielson (Wis.), 110 N. W. Rep. 507, (1898) 1 Q. B. 716, 68 L. J. 746. Q. B. 889, (1899) A. C. 442.

<sup>67</sup> *Mumford v. Walker*, 71 L. J. K. B. 19, 85 L. T. 518, explaining <sup>68</sup> *Bryant v. Hancock*, 78 L. T. Rep. 397, (1898) 1 Q. B. 716.

tenant of a licensed public house or inn that he would keep and conduct the premises in a regular and proper manner and would endeavor to comply with all regulations necessary for a renewal of a license and that he would not do or suffer any act whereby the license would be refused, is an absolute obligation upon the tenant to keep and conduct the premises during the term in a regular and proper manner. Hence he is liable not only for his own acts but for permitting an undertenant to conduct the premises irregularly and improperly. The conviction of an undertenant for having permitted drunkenness upon the premises as a result of which a renewal of the license was refused is a breach of this covenant.<sup>69</sup> The conduct of a tenant of premises which are leased for a long time as an inn, hotel or public house in refusing to serve refreshments on Sundays except to boarders at the house and to their guests, and to travelers and refusing to serve alcoholic liquors except in very limited quantities and only at certain hours is a breach of a covenant by the tenant that he would keep the premises open in the due and proper course of business as a hotel and would conduct the business in a lawful and proper manner.<sup>70</sup> The evident intent and purpose of this covenant was to preserve or increase the value of the premises as a public house and anything which diminishes its prospective custom or future popularity is a breach of the covenant.

**§ 457. Restrictions as to the exhibition of advertising signs by the tenants.** In the absence of an express provision in the lease forbidding the exhibition of signs upon business property, the lessee of a portion of a business building has an absolute right as against his lessor to occupy the outer wall of that portion of the building leased to him, with his advertising signs. This is to be taken with the qualification that the signs are of a proper character, and that they do not extend beyond the portion of the outer wall of the premises leased by the tenant.<sup>71</sup> So generally a tenant of a front office may place his signs at the

<sup>69</sup> *Paletorpe v. Home Brewery, Lim.*, 75 L. J. K. B. 555, (1906) 2 K. B. 5, 94 L. T. 871, 54 W. R. 489, 22 T. L. R. 505, distinguishing *Bryant v. Hancock & Co.*, 68 L. J. Q. B. 889, (1899) A. C. 442.

<sup>70</sup> *Dartford Brewery Co. v. Till*, 95 L. T. 636, 70 J. P. 519, 22 T. L. R. 792.

<sup>71</sup> *Baldwin v. Morgan*, 43 Hun (N. Y.) 355; *Scott v. Fox Optical Co.*, 38 Pitts. L. J. 368.

front entrance of the building.<sup>72</sup> It is competent for the parties to the lease to stipulate that the tenant shall place no signs upon the outer wall or side of the building, and such a stipulation is common where the premises are leased for dwelling or private purposes. If the house is expressly demised for use as a private or dwelling-house, a covenant may fairly be implied that the tenant will not exhibit any advertising signs upon the premises. On the other hand the lease of premises for business purposes will imply the right in the tenant to place appropriate advertising signs in and upon the premises denoting the character and purpose of his occupation with or without the consent of the landlord. A provision in a lease that no sign shall be placed by any tenant upon the front wall of the demised premises which shall be detrimental to any other tenant may, with fairness, be construed to exclude the use of such signs only as would be detrimental from a financial standpoint. The artistic, esthetic or sentimental objections of other tenants would hardly be considered where the premises were wholly or in part leased and occupied for business purposes, by several tenants. A different view might be taken with good reason when the premises were wholly occupied by tenants for dwelling purposes and a tenant should place upon the front of the premises advertising signs which rendered or which were calculated to render the premises conspicuous in the eyes of the public, and to detract from their appearance and suitability as a place of residence. In the case of business property, a tenant, who places a sign on the front of the house in such a way that it extends below the floor line of his apartment, which results in a shadow being cast into the premises of the tenant below which was a source of annoyance to him in his business of displaying pictures breaks a covenant that he will not display signs detrimental to other tenants and the sign will not be permitted to remain unless raised to the level of the owner's own floor.<sup>73</sup>

**§ 458. Leases by organizations conducting camp meeting grounds.** The rule of law that the parties to a lease may insert in the instrument any reasonable restrictions upon the use

<sup>72</sup> Knoepfel v. Kings County Fire Insurance Co., 68 N. Y. 639, 48 How. Pr. (N. Y.) 208.      <sup>73</sup> Oehme v. Shotland, 90 N. Y. Supp. 958.

which the tenant may make of the demised premises is peculiarly applicable to leases of land, or of the buildings located thereon, made by corporations or associations which conduct, upon land owned by them and during the summer months or other seasons of the year, meetings for religious, educational or recreative purposes. The landlord under such circumstances ought to have the right to select whom he would have as lessees. He is not bound to accept any person who is objectionable to him, or who he has good reason to suppose will be objectionable to other lessees. And having selected the persons who he is satisfied to accept as tenants, he may restrict the manner in which they may enjoy the premises leased. If such were not the rule it is extremely likely that buildings leased might be devoted by the lessees to purposes which, though unobjectionable under ordinary circumstances, would defeat, or tend to defeat the general purpose for which the land was leased and for which it is used by the other lessees.<sup>74</sup> A person who rents land or a house situated on land owned by a corporation which has been organized for the purpose of owning and renting land upon which meetings of a religious character commonly called "camp meetings" may be held is presumed to have knowledge of the purpose for which the association was organized, and of the fact that the grounds were to be used for religious purposes. Such being the principal and primary use of the grounds it is clear that, to effectuate such use, the corporation must have and exercise the power of maintaining the strictest supervision over such grounds. The corporation in exercise of such supervision may make and enforce all reasonable rules calculated to advance the primary object of its ownership of the grounds. It may forbid the selling of merchandise or the carrying of any business on the grounds absolutely or may provide that this may be allowed on consent of the

<sup>74</sup> Round Lake Association v. Kellogg, 141 N. Y. 348, 36 N. E. Rep. 326; Linwood Park Association v. Van Dusen, 63 Ohio St. 183, 58 N. E. Rep. 576, 581. And a provision that a lessee shall be bound by rules and regulations which may be adopted by the association inserted in the lease makes the rules themselves

a part of the lease and such covenant runs with the land so that the rules are as binding upon the assignee of the lessee as upon the lessee himself. Round Lake Association v. Kellogg, 20 N. Y. Supp. 261, 65 Hun, 622, affirmed in 141 N. Y. 348, 36 N. E. Rep. 326, distinguishing *In re Jacobs*, 98 N. Y. 105.

corporation. Its lessee who signs a lease stipulating that he contracts subject to the rules of the corporation is bound thereby and on his carrying on business in violation thereof, forfeits his lease and may be enjoined.<sup>75</sup> Thus, a provision in a lease by a camp meeting association that a house leased by it for the season shall be used as a private residence only is valid, and will prevent the lessee from letting furnished rooms or taking boarders.<sup>76</sup> So, where a lessee covenants that he will not use the premises for any purpose inconsistent with the general purpose for which the grounds are used, he will be prevented from letting his rooms for hire and from taking boarders where this is forbidden by the rules of the lessor.<sup>77</sup>

**§ 459. The restriction of the occupancy of the premises to particular persons.** A covenant or condition in a lease that the demised premises shall be occupied only by the tenant, or by some particular person specifically named in the lease, will be liberally construed. Where the language of the covenant is vague so that it may fairly admit of more than one construction it ought to be construed in favor of the tenant. Thus, a covenant that the premises should be occupied by the tenant alone would evidently mean if he were a man of family that it should be occupied by him and his family. This would certainly be the true construction if at the date of the lease the landlord

<sup>75</sup> Round Lake Ass'n v. Kellogg, 141 N. Y. 348, 356, 36 N. E. Rep. 326, affirming 47 N. Y. St. Rep. 668, 20 N. Y. Supp. 261, 267.

<sup>76</sup> Linwood Park Association v. Van Dusen, 63 Ohio St. 183, 58 N. E. Rep. 576, 581. A provision in a lease of land by a corporation which has for its object the holding of land for the purpose of carrying on religious exercises and meetings on the same that the lessees "during all meetings would be subject to the rules and regulations of said meeting" and "would use such premises for the purpose of private dwelling or residence only, except on a special permit from the company is valid and may be enforced by an injunc-

tion in equity. The renting of rooms by lessees as a business to temporary occupants, their refusal to obtain a special permit from the lessor and their refusal to comply with the reasonable requirements of the lessor are a breach of the covenant to use the premises for a private dwelling only. The refusal to pay a gate fee during the meetings for admission to the grounds of the lessor is a breach of the covenant to be subject to the rules and regulations of said meeting. Linwood Park Association v. Van Dusen, 63 Ohio St. 183, 199, 58 N. E. Rep. 576, 581.

<sup>77</sup> Chautauqua Ass'n v. Alling, 46 Hun (N. Y.) 582.

knew the tenant had a family and the demised premises were a dwelling house. But a lease of premises to a woman, who, when the lease is made is unmarried "but only for herself to occupy as a residence" is not forfeited by her occupancy of the premises with her husband and children when she marries during the term.<sup>78</sup> A provision in the lease of business property that it shall only be occupied by the tenant means that no other person shall occupy it for the purpose of carrying on business therein. It can hardly mean that no other person can occupy it jointly with the tenant for another purpose though such a condition restricting the occupancy of the premises to one person is almost if not quite equivalent to a condition against assignment of the lease. It has also been held that a condition in a lease of a farm that the lessee should "not permit any other person to occupy the premises" is not broken by the lessee receiving another person into his family as a boarder.<sup>79</sup>

**§ 460. Injunction by the landlord to restrain a prohibited use of the premises by the tenant.** An agreement by the tenant limiting the use which he may make of the premises, is in equity considered to be a part of the consideration which he promises to pay for the possession delivered to him. The landlord will be entitled in equity to a decree directing the tenant to make a specific performance of his covenant relating to the use and enjoyment of the premises by him, and the jurisdiction of equity over such a covenant, does not at all depend upon the irreparable injury which the landlord will sustain or upon a lack of adequate relief at law, but on the right of a party to a contract to have it specifically performed.<sup>80</sup> In carrying out a decree for specific performance, the court will grant injunctive relief.<sup>81</sup>

<sup>78</sup> *Schroeder v. King*, 38 Conn. 78.

<sup>79</sup> *Stanton v. Allen*, 32 S. Car. 587, 588, 10 S. E. Rep. 878.

<sup>80</sup> *Peer v. Wadsworth*, 67 N. J. Eq. 191, 58 Atl. Rep. 379, 383; see, *Kirkpatrick v. Peshine*, 24 N. J. Eq. 206.

<sup>81</sup> "It is, however, settled that agreements restricting within reasonable limits the use of premises may be made upon their sale or lease, and that when such re-

strictions are made, they are considered to be part of the consideration upon which the vendee or lessee receives the premises or their possession. The vendor or lessor is therefore entitled to the specific performance of the lawful agreements relating to the use or enjoyment of the property sold or leased, and the equitable jurisdiction to enjoin the violation of the agreement does not depend on irreparable injury or lack of ade-

If the lessee is expressly or by necessary implication restrained by the lease in the use which he may make of the premises, he will be enjoined from using the premises for any other purpose though the latter purpose be harmless.<sup>82</sup> Nor is it material that the use for the prohibited purpose creates a forfeiture and confers a right of re-entry upon the lessor. He is never confined to that remedy which is usually inadequate as it does not place the lessor in as good a position under any circumstances as the performance of the covenant by the lessee would.<sup>83</sup> On the one hand it has been held that a breach of a covenant for a particular use will be enjoined though the lessor has also a right to re-enter for breach of condition and an action against

quate relief at law, but is founded on the right to specific performance of contracts. *Kirkpatrick v. Peshine*, 24 N. J. Eq. 206 (Chancellor Zabriskie, 1873), states the principle in relation to covenants in the sale of premises, and, where positive stipulations as to acts of waste are made between the parties to a lease, either party has the right to insist on the literal performance of the contracts irrespective of the question of damages." *Peer v. Wadsworth*, 67 N. J. Eq. 191, 58 Atl. Rep. 379, on p. 383.

<sup>82</sup> *Parkman v. Aicardi*, 34 Ala. 393, 73 Am. Rep. 457; *Bryden v. Northrop*, 58 Ill. App. 233, 235; *Reed v. Lewis*, 74 Ind. 433, 436, 39 Am. Rep. 88; *Jalageas v. Winton*, 119 Ill. App. 139, 144; *Godfrey v. Black*, 39 Kan. 193, 198, 17 Pac. Rep. 849, 7 Am. St. Rep. 544; *New Orleans & Carrollton R. R. Co. v. Darms*, 39 La. Ann. 766, 767, 2 So. Rep. 230; *Ganett v. Alabree*, 103 Mass. 372, 374; *Maddox v. White*, 4 Md. 72, 78, 59 Am. Dec. 67; *Wertheimer v. Hosmer*, 83 Mich. 56, 61, 47 N. W. Rep. 47; *Howard v. Ellis*, 6 N. Y. Super. Ct.

Rep. (4 Sandf.) 369, 374; *Dodge v. Lambert*, 15 N. Y. Super. Ct. Rep. (2 Bosw.) 570; *Gillilan v. Norton*, 29 Super. Ct. Rep. (6 Rob.) 546; *De Forest v. Byrne*, 1 Hilt. (N. Y.) 43; *Steward v. Winters*, 4 Sandf. Ch. (N. Y.) 587; *Round Lake Ass'n v. Kellogg*, 141 N. Y. 348, 36 N. E. Rep. 326; *Ware v. Langmade*, 9 Ohio Cir. Ct. Rep. 85; *Frank v. Brunnemann*, 8 W. Va. 462; *Brugman v. Noyes*, 6 Wis. 1, 11; *Hudson v. Cripps* (1896), 1 Ch. 265; *Wilkinson v. Rogers*, 10 Jur. (N. S.) 5, 9 L. T. 434, 12 W. R. 119; *Tritton v. Barnhart*, 56 L. T. 306.

<sup>83</sup> *Godfrey v. Black*, 39 Kan. 193, 197; *Barrett v. Blagrave*, 5 Ves. 555. "True, he may perhaps declare the lease forfeited and recover the property, but he may not desire to do this; he may not be able to lease for the same rent or to an equally responsible tenant and the lessee ought not to be permitted to compel the lessor either to take back the property or tolerate a forbidden use." *Bodwell v. Crawford*, 26 Kan. 292; *Stees v. Kranz*, 32 Minn. 313; *Godfrey v. Black*, 39 Kan. 193, 196.

his lessee for damages.<sup>84</sup> But on the other hand it appears that where the lessor may by express agreement terminate the lease for a breach and collect damages for the same, he will not be granted an injunction against an improper or unauthorized use of the premises.<sup>85</sup> In such cases inasmuch as the lessor has no adequate remedy at law for this reason alone a court of equity will interfere and afford him injunctive relief though the damages to the premises or to the lessor may not be irreparable.<sup>86</sup> The jurisdiction of equity is invoked under such circumstances partly upon the reasons at the basis of the power of a court of equity to compel the specific performance of contract in lieu of putting the party aggrieved to an inadequate remedy at law in the shape of an action for damages and partly because of the necessity of preventing a constantly recurring injury to the lessor by a continuous breach of the covenant. An action at law under such circumstances would assuredly be an adequate remedy. So to confine the lessor to his legal remedy would inevitably lead to a multiplicity of actions (which equity is always presumed to be desirous of preventing), because, on account of the continuous character of the grievance, a new cause of action will arise every day. It is also generally held that the fact that the prohibited use does not deteriorate the premises in value or that, on the other hand, the lessee has spent large sums of money in adapting the premises to the prohibited use, is absolutely immaterial upon the question of an injunction.<sup>87</sup> So, where a building is leased for a hotel with a covenant against subletting, the lessee will be enjoined from subletting a portion of the premises for a real estate office, if it shall appear that such use detracts

<sup>84</sup> Parker v. Whyte, 32 L. J. Ch. 520, 2 N. R. 157, 8 L. T. 446, 11 W. R. 683; Godfrey v. Black, 39 Kan. 193, 197, 17 Pac. Rep. 849, 7 Am. St. Rep. 544.

<sup>85</sup> Brown v. Niles, 165 Mass. 276, 43 N. E. Rep. 90.

<sup>86</sup> Spalding Hotel Co. v. Emerson, 69 Minn. 292, 72 N. W. Rep. 119, holding that the lessor might prevent the lessee by an injunction from converting premises which had been leased to him for use as a hotel into a private home-

stead. Where a lease contains a covenant that neither the lessee nor his assigns, should erect a building which should obstruct the light and air of a building on an adjacent lot an injunction will lie at the suit of the lessor, to prevent a breach of this covenant as he has no adequate remedy at law. Thruston v. Minke, 32 Md. 487, 496, 497.

<sup>87</sup> Dodge v. Lambert, 2 Bosw. (N. Y.) 570.

from the reputation of the place as a hotel and impairs its value as such.<sup>88</sup> And it has also been held that the fact that an injunction will lie, or that the lessor has an adequate legal remedy to compel the lessee to observe his covenants does not deprive the lessor of his right to recover all the damages he may prove or to pursue any other remedy he may have at law.<sup>89</sup> In conclusion it may be said that while an injunction will be granted to prevent a prohibited use of the premises, equity will not interfere to compel a tenant to use the premises in the manner to which his use has been restricted by the lease. For generally equity will not decree the specific performance of a contract which requires the exercise of skill and good faith on the part of the lessee, or where a performance of a covenant by him would require such a supervision by a court, or by an officer of the court as would make it unpracticable for the court to enforce the covenant. So, generally, where the performance of the covenant to use the building demised for a certain purpose involves the continuous performance of actions on the part of the lessee which must be supervised and which he may at any moment cease to perform, equity will not interfere, and will not under such circumstances compel the lessee by mandatory injunction to perform his covenant.

**§ 461. The implied covenant by a farm tenant for good husbandry.** Aside from express covenants inserted in the lease of farm land prescribing its cultivation by the tenant in a par-

<sup>88</sup> Godfrey v. Black, 39 Kan. 193, 17 Pac. Rep. 849.

<sup>89</sup> United States Trust Co. of New York v. O'Brien, 143 N. Y. 284, 291, 38 N. E. Rep. 266. If the violation of a covenant by a lessee or a sublessee amounts only to a trespass, no injunction will be granted. Brooks v. Diaz, 35 Ala. 599. It is never necessary to show that the prohibited use amounts to a nuisance or even that it damages the lessor, Steward v. Winters, 4 Sandf. Ch. (N. Y.) 587, or that an irreparable injury would ensue to him, Frank v. Brunnemann, 8 W. Va. 462, 471,

in order to procure an injunction. A covenant that a store is to be used for an oil cloth and dry goods store, and that a lessee will place no sign at the door, except with the consent of the lessor, will prevent the lessee from placing an auctioneer's flag at the door and from using the store as an auctioneer's establishment, as well as from selling goods in the store other than oil cloths and dry goods. Weil v. Abrahams, 100 N. Y. St. Rep. 244, 66 N. Y. Supp. 244, 53 App. Div. 313; Stewart v. Winters, 4 Sandf. Ch. (N. Y.) 587.

ticular, a covenant is always implied in the lease of a farm *eo nomine* or of farming land whether so described or not that it shall be used by the lessee as farm land and not otherwise. The use of such land by the tenant for the erection of a manufacturing establishment or for a stone quarry or for a resort for the public for amusement purposes or its subdivision by him into small plots and the erection of dwelling houses thereon with their leasing to subtenants would give the lessor a cause of action. It is also implied, in the absence of an express agreement to the contrary, that the land composing the farm shall be cultivated in a careful manner, without waste and according to the rules of good husbandry as recognized in the vicinity which means that the soil shall not be unnecessarily exhausted by negligent or improper tillage, and that necessary repairs shall be made by the tenant to fences, barns and outbuildings.<sup>90</sup> This covenant is implied in favor of the landlord and for his protection especially as against tenants for short or uncertain terms, who, in view of the insecurity and briefness of their tenure might perhaps for their own protection be prompted to exhaust the land or strip it of everything they could carry off. Subsequent tenants succeeding could not know to what extent the fertility or productiveness of the land had been diminished by their predecessors nor would owners care to lease farm land at the risk of having it ruined by improper cultivation. Hence, upon the whole, the implied covenant operates to the benefit of landlord and tenants alike.<sup>91</sup> A due proportion of meadow land upon a farm of any considerable size is usually consistent with

<sup>90</sup> Walker v. Tucker, 70 Ill. 527, 534; Irwin v. Mattox, 138 Pa. St. 466, 21 Atl. Rep. 209, 27 W. N. C. 382; Clark v. Harvey, 54 Pa. St. 142; Chapel v. Hull, 60 Mich. 167, 172, 26 N. W. Rep. 874; Lewis v. Jones, 17 Pa. St. 262, 265; Wing v. Gray, 39 Vt. 261; Pawley v. Walker, 5 T. R. 373, 2 R. R. 619. "Every tenant (where no particular agreement exists dispensing with such engagements) is bound to cultivate his farm in a husband-like manner, and to consume the produce on it. This is one en-

gagement that arises out of the letting, and which the tenant cannot dispense with unless by special agreement." Buller, J., in Brown v. Crump, 1 Marsh, 567. See, also, Hudson v. Porter, 13 Conn. 59.

<sup>91</sup> In Vermont the fact of bad husbandry by a tenant of farm land is a proper subject of recoupment by the landlord on the general issue. Gregory v. Thompson, 68 Vt. 410, 35 Atl. Rep. 350; Allen v. Hooker, 25 Vt. 137; Keyes v. Slate Co., 34 Vt. 81, 84.

good husbandry. Hence it is a breach of the implied covenant of good husbandry for a tenant to plow up all the meadow and sow a crop in it which effectually destroys the character of the land as meadow.<sup>92</sup> It is not bad husbandry to plow meadow land and set it with corn where sufficient meadow in unbroken sod is left on the farm, and where it was easy to reset it with grass and it furthermore appeared that during the thirty years preceding this piece of land had been fifteen or twenty times planted in corn.<sup>93</sup> And the use of the land for pasture is consistent with good husbandry.<sup>94</sup> In the absence of any express covenant to that effect a tenant is never bound to consume for himself and family all he may raise upon the land. Nor is there any implied covenant that he will feed all the hay and other fodder grown upon the farm to his own stock on the farm though by implication he is bound not to sell manure made upon the farm by his cattle during the term. The courts are inclined to a stringent enforcement of the implied covenant for good husbandry and will where the facts warrant it and in an extreme case regard it as a condition a breach of which puts an end to the term and permits the landlord to re-enter. Where there is an express covenant by the tenant to cultivate the farm in a particular manner with a provision for a re-entry by the landlord on the breach of any covenant in the lease, the covenant to cultivate will be regarded as a condition and enforced accordingly. Hence, in a case where a lessee of a farm was by reason of his poverty or otherwise in no condition to cultivate it, and his lease did not permit him to sublet it without the consent of the lessor, and he had covenanted to plant, properly work and harvest all crops grown on the premises the lessor was held not bound to permit the farm to remain uncultivated on the lessee's default but he might at once enter and take possession of the land where the lease contained a provision for re-entry on a breach of covenant.<sup>95</sup> On the other hand, the tenant is precluded from claiming remuneration for voluntarily cultivating the land contained in the farm in a more beneficial

<sup>92</sup> Chapel v. Hull, 60 Mich. 167, 466, 21 Atl. Rep. 209, 27 W. N. C. 26 N. W. Rep. 874. 382.

<sup>93</sup> Hubble v. Cole, 85 Va. 87, 92, 7 S. E. Rep. 242. <sup>95</sup> Wright v. Everett, 87 Iowa, 697, 55 N. W. Rep. 4.

<sup>94</sup> Irwin v. Mattox, 138 Pa. St.

manner than the lease calls for as a distinct cause of action or in mitigation of waste done by him.<sup>96</sup>

**§ 462. Evidence to prove what is good husbandry.** Persons living in the neighborhood of the demised premises and having knowledge of the soil, climate and mode of cultivation may testify what in their opinion constitutes good husbandry in any particular case.<sup>97</sup> Where a lease stipulates that the lessee shall cultivate a farm in a workmanlike manner or its equivalent in a farmerlike manner it may also be shown by such witnesses how and to what extent, lime and manure should be put upon the land and by whom and also what and when the land ought to be plowed.<sup>98</sup> The character of the land and custom as to cultivation of farms in the vicinity are always relevant.<sup>99</sup>

**§ 463. Covenants regulating the use and cultivation of a farm by the tenant.** Aside from the implied covenant by the tenant of agricultural land to cultivate the land in a husband-like manner and not to commit waste thereon, it is also competent for the parties to a lease of farm land to stipulate in express terms that the tenant shall cultivate the land in a particular manner. He may be forbidden by the terms of his lease to cultivate the land in a particular manner or to sow and plant particular crops upon it. He may be forbidden to cut down all the timber or some particular sort of timber, or the timber in some particular place. He may also be compelled by a stipulation in the lease to sow certain crops and to sow certain parts of the land in preference to other portions. This class of covenants restricting the use which the tenant may make of farm land is more frequently to be found in English leases than in American leases. Several of them have been construed by the English courts. Thus, a covenant by a tenant of a farm lease not to sow with more than two grain crops in four years, applies to any four years of the term however taken, and not to each successive four years from the covenant of the lease.<sup>1</sup> A covenant to put under cultivation uncultivated land is usually a continuing covenant which is broken during the whole time the

<sup>96</sup> Bullitt v. Musgrave, 3 Gill (Md.) 31.

<sup>97</sup> Aughinbaugh v. Coppenheffer, 55 Pa. St. 347, 349.

<sup>98</sup> Aughinbaugh v. Coppenheffer, 55 Pa. St. 347, 349.

<sup>99</sup> Hubble v. Cole, 85 Va. 87, 93, 7 S. E. Rep. 242.

<sup>1</sup> Fleming v. Snook, 5 Beav. 250.

uncultivated land is left in its original condition. But a covenant to keep land in cultivation cannot be broken unless the land is either in cultivation or unless it is put in cultivation. A covenant to keep a piece of uncultivated moorland in cultivation cannot be broken until the land is first put in cultivation. A covenant to put in cultivation within a specified period and thereafter to keep in good farming condition, is an entire covenant. A landlord may lose his right to enforce the latter clause by his delay in enforcing his right under the former. Thus, where thirty years after the lease was signed, the land never having been cultivated at all, the tenant or his assignee converted the land to purposes which prevented absolutely its cultivation as farm land equity refused to decree to the landlord a specific performance of the covenants of the lease. And the chancellor would not enjoin the present occupant of the land from using it for that purpose which would prevent its cultivation.<sup>2</sup> A covenant in a lease empowering a tenant to build, and binding him to cultivate in a husbandlike manner, all land not built on, includes land upon which buildings were erected and subsequently torn down. The neglect of the tenant to cultivate such land is a forfeiture which is not waived by the landlord accepting from the tenant a part of the proceeds of the sale of the buildings.<sup>3</sup>

**§ 464. A covenant in a lease of a farm to consume all fodder on the land.** In the absence of express language neither an express nor any implied covenant on the part of the tenant to cultivate a farm in a husbandlike manner compels the tenant to feed to the stock on the farm all the fodder raised which is on it.<sup>4</sup> In England where most farm land is held under leases, it is customary to insert in farm leases a covenant by the tenant that he will not remove or sell off the farm, the hay, straw and fodder which may be raised there. The intent and purpose of such a covenant are to secure the feeding of hay and fodder to the cattle kept on the land and for this reason while such an

<sup>2</sup> *Musgrave v. Horner*, 31 L. T. 632, 23 W. R. 125.

<sup>3</sup> *Hills v. Rowland*, 4 De G. M. & G. 430, 22 L. J. Ch. 964, 1 W. R. 422.

<sup>4</sup> *Wing v. Gray*, 36 Vt. 261, 266, 267; *Lewis v. Lyman*, 22 Pick.

(Mass.) 437, 444, 445; *Middlebrook v. Corwin*, 15 Wend. (N. Y.) 169; *Brown v. Crump*, 1 Marsh C. P. 567; *Legh v. Hewitt*, 4 East, 154 159; *Moulton v. Robinson*, 27 N. H. 550, 561.

agreement would be no disadvantage to a tenant who used a farm wholly for dairy purposes, it would be manifestly to the disadvantage of a tenant who used the farm for general farming. In construing a covenant not to remove "hay, straw or other dry fodder," the court held that the tenant was prohibited from selling hay raised on the farm though the hay was unfit to be fed to his cattle. Where it is the evident intention of the parties to a lease of a farm that everything which is grown on the farm shall remain on it, that intention will be respected.<sup>5</sup> So, it may be provided that the tenant shall not sell any hay or straw off the farm and that if he shall do so, he shall return the value of the hay or straw thus sold in manure on the land comprised in the farm.<sup>6</sup> These covenants will generally be construed favorably to the landlord where this can fairly be done, for a tenant of farm land who limits his power to cultivate or use it does so with his eyes open and is bound to take the consequences. Where the tenant covenants that he will not during the "last year of the term" sell or remove from the farm hay, straw or fodder which should arise or grow on the farm, he will be restrained not only from removing such articles as arose and grew on the farm during the last year of the term, but those which had arisen and had grown at any time during the term.<sup>7</sup> In England, it is provided by a statute that the assignee of a bankrupt shall not take any hay, etc., from a farm which the bankrupt could not take. A trustee in bankruptcy of a tenant under a lease which restricts the tenant from selling the hay, straw, etc., grown upon the farm cannot, though he disclaims the lease, sell the hay, etc., on the farm.<sup>8</sup> So, a trustee in bankruptcy who removes and sells the hay that his bankrupt the tenant was restrained from selling, is liable personally for the conversion at the suit of the landlord, though he has disclaimed the lease.<sup>9</sup>

**§ 465. An injunction to restrain the breach of a covenant in a lease of a farm.** Under some circumstances an injunction will be issued in a court of equity to restrain a tenant of farm-

<sup>5</sup> Fielden v. Tattersall, 7 L. T. 718.

<sup>8</sup> Lybbe v. Hart, 54 L. J. Ch. 860, 29 Ch. D. 8, 52 L. T. 634.

<sup>6</sup> Lowndes v. Fountaine, 11 Ex. 487, 25 L. J. Ex. 49, 4 W. R. 152.

<sup>9</sup> Schofield v. Hincks, 58 L. J. Q. B. 147, 60 L. T. 573, 37 W. R. 157.

<sup>7</sup> Gale v. Bates, 3 H. & C. 84, 10 Jur. (N. S.) 734, 10 L. T. 304, 12 W. R. 715.

ing land from a breach of a covenant to cultivate it in a particular manner. Thus, a tenant who has covenanted to cultivate the farm in a husbandlike manner will be enjoined from plowing up the pasture or meadow for the purpose of building thereon.<sup>10</sup> A circumstance that will guide the court in enjoining the tenant is that the land has been pasture or meadow for many years. Thus, it is unquestioned that plowing up pasture land which had been such for thirty years and planting grain or vegetables thereon would be a breach of a covenant to cultivate in a husbandlike manner,<sup>11</sup> and would be enjoined while the contrary rule would be recognized and an injunction refused, if the land, which is pasture during the term, had been plowed up a short time before the term commenced.<sup>12</sup> If damages for the breach of the covenant by the tenancy to cultivate a farm are ascertainable, no injunction will issue. Thus, if the parties have in the lease agreed that the damages shall be liquidated, the court will not enjoin the tenant. Whether the sum mentioned is liquidated damages or a penalty will be determined by the court and if it is liquidated damages the tenant will be made to pay them. Thus, where a tenant covenanted not to plow pasture land and if he did, then to pay so much per year for every acre, the court refused an injunction to prevent the tenant from plowing land and decreed that he should pay the amount named.<sup>12a</sup> If, however, the sum named for a breach of a tenant's covenant is, in the opinion of the court, plainly a penalty and not liquidated damages, the court will relieve the tenant from the penalty and may at the same time enjoin him from breaking his covenant.<sup>12b</sup>

**§ 466. Estoppel on the landlord to recover for improper use of premises.** A landlord has a right to assume that a tenant who rents his premises for a particular business use will carry

<sup>10</sup> Drury v. Molins, 6 Ves. 328; Lord Grey De Wilton v. Saxon, 6 Ves. 106.

<sup>11</sup> See Pulteney v. Shelton, 5 Ves. 147, 200, 261.

<sup>12</sup> Goring v. Goring, 3 Swan, 661.

<sup>12a</sup> Woodward v. Gyles, 2 Vern. 119.

<sup>12b</sup> Garden v. Butler, Hay & J.

112, but see Aylet v. Dodd, 2 Atk. 239; Burne v. Madden, Ll. & G. T. Plunk, 493. The English cases view the ploughing up of ancient pasture land by a tenant as a kind of commissive waste and base the granting of an injunction largely upon the implied covenant against waste by the tenant.

on that business in a proper and lawful manner. If when the landlord makes a lease for the particular business he knows that the tenant is going to carry on a lawful business in such a manner as to be a public nuisance on his premises, he is estopped to recover damages for any injuries he may suffer. But if he is, when making the lease, ignorant of the improper mode in which the tenant intends to and does in fact conduct his business, the landlord may recover damages for whatever injury may result to him thereby.<sup>13</sup> Where a landlord knowing that a tenant is about to use the demised premises in a way and for a purpose which will result in injury to them, encourages the tenant to do so, and thus gives his consent in advance, he cannot recover damages for an improper and unreasonable use of the premises. He is estopped upon general principles. For having by assuring the tenant that the building would not be injured by the use to which the tenant would put it, persuaded him to take a certain course of action, he cannot recover damages for any injury which he has thus consented to and aided in producing.<sup>14</sup> A covenant or condition restricting a lessee in the use which he may make of the premises may be waived by the conduct or acquiescence of the lessor. If the lessor, knowing the lessee is about to alter the architectural and structural features of the house in order to fit it for a use which is forbidden by the lease, or if the lessor knows that the lessee is spending or is about to expend large sums of money in preparing to use the house for a purpose which is a breach of a covenant of the lease, remains silent so that the lessee proceeds to complete what he has begun, the lessor may be estopped subsequently to urge a breach of the condition. The lessor must speak and object as soon as the contemplated breach comes to his knowledge. A failure to act by the lessor for an unreasonable time after he has learned that the lessee is actually using the premises for a purpose which is forbidden by the lease may be a waiver on the part of the lessor of the breach. But in connection with this rule it may be well to bear in mind that a breach of a covenant not to use the premises for a particular purpose is in most cases a continuing breach occurring from day to day and that however

<sup>13</sup> Fogarty v. Junction City P.      <sup>14</sup> Murphy v. St. Louis Type B. Co., 50 Kan. 478, 487, 31 Pac. Foundry, 29 Mo. App. 541, 547. Rep. 1052, 18 L. R. A. 756.

the landlord shall be barred by laches and delay in enforcing the first breach, he may still have a valid ground of objecting to those which are more recent. Thus where a tenant uses the premises for a purpose prohibited by the lease, there is a continuing cause of forfeiture of which the landlord is not precluded from taking advantage by reason of his having received rent which accrued after the breach was committed in the first instance.<sup>15</sup> In any event a condition that premises shall not be used for any purpose other than the one specified is not waived by the landlord permitting them to be used for a purpose analogous to, but not precisely identical with the one in question.<sup>16</sup>

**§ 467. The obligations of the assigns and subtenants under covenants of the lessee restricting the use of the premises.** The remedy of a lessor against a subtenant who has broken a covenant of his own lessor which restricts the latter in the use of the premises, differs materially in a court of equity from the remedy which the original landlord would have in a court of law. In equity the subtenant who enters upon the possession of premises, is chargeable with notice of all the covenants in the lease signed by his lessor which restrict him in any way relating to the use of the land, though in law there is no privity of contract or of estate between the original landlord and a subtenant. The landlord therefore has the same remedy in equity against the subtenant as against any other purchaser with notice of the lease on a covenant of the lessor restricting the use of the premises.<sup>17</sup> If, therefore, the subtenant uses the building for a purpose which is a breach of his own lessor's covenant, the original lessor may prevent such a use by an injunction against the subtenant. A sub-lessee whose immediate lessor is restricted by covenant from carrying on a particular trade will also be restrained from carrying on that trade though he took his lease without actual knowledge of the covenant, unless he can show that he made careful inquiries at the time of taking his lease and learned of nothing which would justify him in making further investigation.<sup>18</sup> He will be presumed to know the cove-

<sup>15</sup> *Farwell v. Easton*, 63 Mo. 446, Eq. 19, 58 Atl. Rep. 379, 381; 449. *Evans v. Davis*, 48 L. J. Ch. 223,

<sup>16</sup> *Gannett v. Albree*, 103 Mass. 372, 374. 10 Ch. D. 747, 39 L. T. 391, 27 W. R. 285.

<sup>17</sup> *Peer v. Wadsworth*, 67 N. J. 18 *Parker v. Whyte*, 1 H. & M. 167,

nants contained in the lease under which his lessor claims.<sup>19</sup> For in equity as a general rule a covenant which restrains the lessee from using the property for a particular purpose, or which restricts his use of the property to a purpose specifically named in the lease, is a covenant which runs with the land. Such a covenant is one which, to use the expressions contained in the cases, particularly "touches the land." It is immaterial that the word "assigns" is not used in the covenant. Thus, a covenant by which the tenant of a hotel agrees with his landlord that he will not sell or permit to be sold in the hotel during the term any liquors except those supplied by his landlord or his successor, runs with the land and will be binding upon a person who purchases the hotel and takes an assignment of the lease.<sup>20</sup> The restrictive covenant is binding therefore, upon every person who succeeds to the interests and rights of the lessee in the premises, whether the word assignee or assign be inserted in the lease or not.<sup>21</sup> Such a covenant is never regarded as a mere collateral undertaking, but is attached to the land itself.<sup>22</sup> So,

32 L. J. Ch. 520, 8 L. T. 446, 11 W. R. 683; Clements v. Welles, 11 Jur. (N. S.) 991, 14 W. R. 187.

<sup>19</sup> Inasmuch as a sub-tenant takes and enjoys his possession of the premises subject to all the limitations, conditions and restrictions of the original lease it follows that he is bound by all the conditions and covenants therein contained which run with the land. Hence if the original lease is subject to a forfeiture for the breach of one or more covenants or conditions in the lease which run with the land it is advisable for the original lessee to take security from his sub-tenant against breaches by him of covenants or conditions in the original lease which may result in its being forfeited. Having made a sub-lease and placed the sub-tenants in possession the original lessee is responsible for their conduct. They are in under his lease and his ti-

tle and if they violate any condition or covenant of the original lease to which a forfeiture is attached their conduct will work a forfeiture to the same extent as though the violation was by the original lessee. Wheeler v. Earle, 5 Cush. (Mass.) 31, 35, 51 Am. Dec. 41.

<sup>20</sup> White v. Southend Hotel Co., 66 L. J. Ch. 387, (1897) 1 Ch. 767, 76 L. T. 273, 45 W. R. 434, following Tatem v. Chaplin, 2 H. Bl. 133; Clegg v. Hands, 59 L. J. Ch. 477, 44 Ch. D. 503, and Fleetwood v. Hull, 58 L. J. Q. B. 341, 23 Q. B. D. 35.

<sup>21</sup> Garnett v. Albree, 103 Mass. 372, 374.

<sup>22</sup> Tatem v. Chaplin, 2 H. Bl. 133 (where the lessee covenanted to live on the land); Vyvyvan v. Arthur, 1 Barn & C. 410; Fleetwood v. Hull, 23 Q. B. D. 35; Clegg v. Hands, 44 Ch. Div. 503, 518; Tulk v. Moxhay, 2 Phil. Ch.

where the purchaser of the land has covenanted with his vendor that the building should not be used for a certain business and the vendee subsequently leases without any express restrictive covenant, the lessee will be bound by the lessor's covenant in equity, though strictly speaking the covenant does not run with the land.<sup>23</sup> So, a subtenant of a lessee who is restricted in the use he may make of the premises is bound in equity by the covenant limiting the power of his lessor. The subtenant is bound by the covenants of the original lease and he cannot plead his ignorance of them for it will be conclusively presumed that he has had constructive notice.<sup>24</sup> But the common law in case of a breach of a covenant restricting the use of the premises by the acts of a sub-lessee, does not usually afford any remedy to the original landlord. The lease will not be forfeited by the act of a subtenant in using the premises in a manner prohibited by a covenant in the original lease, unless it is expressly so provided therein. Nor can the original landlord recover damages on the covenant of his lessee for the act of the subtenant in using the premises for a prohibited purpose unless the original lessee has expressly covenanted that he will be liable for the acts of his subtenant in using the premises for the forbidden purpose. The lessee may, if he shall desire, make himself liable at law for the acts of others in using the premises for an unlawful or prohibited purpose. He may by appropriate language in a covenant, bind himself to prevent other persons from using the premises for a forbidden purpose as well as to refrain from doing so himself. This he must do at law by express language or by very necessary implication. Thus, a covenant by the lessee that he will not "make or suffer" or that he will "not

774; *White v. Hotel Co.*, (1897) 1 Ch. 767; *Heidon v. Wright*, 6 Ohio Dec. 315, 4 N. P. Rep. 235; *Heidon v. Wright*, 60 Ohio St. 609, affirming *Wright v. Heidon*, 6 Ohio Dec. 151, 4 Ohio N. P. 724.

<sup>23</sup> *Wilson v. Hart*, 35 L. J. Ch. 569, L. R. 1 Ch. 463, 12 Jur. (N. S.) 460, 14 L. T. 499, 14 W. R. 748; *Maunsell v. Hart*, 1 L. R. Jr. 88, but compare *Fielden v. Slater*, 38 L. J. Ch. 379, L. R. 7 Eq. 523, 20 L. T. 112, 17 W. R. 485. *Contra*

*Hodson v. Coppard*, 7 Jur. (N. S.) 11, 9 W. R. 9.

<sup>24</sup> *Flight v. Barton*, 2 M. & K. 282; *Wheeler v. Earle*, 5 Cush. (Mass.) 35; *Dunn v. Barton*, 16 Fla. 765, 773, holding that a covenant by a lessor that he would not carry on a business in the leased premises which would compete with that of his lessor binds a sub-lessee who may be enjoined if he does so.

use or permit the premises to be used" for a particular purpose is an agreement not only that he will not use the premises for such purpose, but that he will not permit or suffer others to do so. On this covenant damages may be recovered at law.<sup>25</sup> A covenant by a lessee that he will not suffer anything to be done upon the premises whereby the renewal of the license for the use of the premises for a public house shall be withheld is not broken by the conviction of a subtenant of an offense by reason of which a renewal of the license was refused, inasmuch as the undertenant is not the agent or servant of the lessee or of the assignee of the lessee so as to make the latter liable on the covenant for the act of the undertenant.<sup>26</sup> Though a covenant by a lessee not to use the premises for a particular purpose runs

<sup>25</sup> *Miller v. Prescott*, 163 Mass. 12, 39 N. E. Rep. 409, 47 Am. St. Rep. 404, where the covenant was "not to make or suffer any waste, or any unlawful, improper or offensive use of the said premises." *Wheeler v. Earle*, 5 Cush. (Mass.) 31. "The lessee will not occupy nor suffer the buildings to be occupied for any unlawful purpose." *Granite Building Corporation v. Greene*, 25 R. I. 586, 57 Atl. Rep. 649, 652; *Doe v. Keeling*, 1 M. & Sel. 95; *Doe v. Bond*, 5 B. & C. 855; *Doe v. Godwin*, 4 M. & S. 265; *Doe v. Keeling*, 1 Maule & Sel. 95 ("not to use or exercise, or permit or suffer to be used or exercised \* \* \* any trade or business whatever"); *Doe v. Spry*, 1 Barn. & Ad. 617 ("will not permit or suffer any person to carry on trade of butcher"); *Doe v. Elsom*, 1 M. & M. 189 ("or if any auction shall be had on premises, or use them for sale of pork"). In *Miller v. Prescott*, 163 Mass. 12, 39 N. E. Rep. 409, the court said, "We are of opinion that the agreement not to 'make or suffer' an unlawful use of the premises must be interpreted as a stipulation that

there shall be no unlawful use by the original lessee or by any person who is occupying under him. With this interpretation effect is given to the word suffer. It may not be reasonable to hold that the covenant makes the lessee liable for an unlawful use of the property by trespassers, but he may well be held to suffer an unlawful use of the property if he does not take effectual measures to prevent such a use by those who occupy by his authority."

<sup>26</sup> *Wilson v. Twamler*, 73 Law. J. K. B. 703, (1904) 2 K. B. 99, 90 Law T. 751, 52 Wkly. Rep. 529, 20 Times Law R. 440; *Bryant v. Hancock*, 67 Law J. Q. B. 507, 1 Q. B. 716, 78 Law T. (N. S.) 397, 46 Wkly. Rep. 386, 62 J. P. 324. The use by a sub-tenant of premises for a purpose which is declared to be illegal by statute and which use "by a tenant or occupant will annul or make void the lease or other title under which the occupant holds" will not invalidate the original lease. *Healy v. Traut*, 15 Gray (Mass.) 312, 313; *O'Connell v. McGrath*, 14 Allen (Mass.) 289.

with the land, a covenant by a lessor not to compete on other premises with the business carried on by the lessee in the demised premises does not run with the land. A covenant by the lessor not to compete with the business carried on by his lessee cannot be enforced by the assignee of the lessee, as it is not a covenant which runs with the land.<sup>27</sup> A covenant by the lessor not to erect a building on other premises in which shall be carried on a business which shall compete with that of the tenant does not run with the land.<sup>28</sup>

**§ 468. The storage of combustibles in the premises.** Where a tenant who has rented the premises for a particular use, devotes them without the landlord's consent to a purpose which is likely to prove dangerous in that it renders the premises liable to be burned, he will be liable to the landlord for his act as for a breach of covenant, in diverting the premises from the use agreed upon. If the tenant put the premises to an unauthorized use by storing inflammable materials in them, he will be liable for damages to the premises by fire, no matter when, where or how originating if it appears that the damage resulted from the presence of such material and would not have resulted but for its presence. The principle would be applicable to the unauthorized storage by the tenant of cotton, benzine, naphtha, gunpowder or other easily inflammable or combustible material.<sup>29</sup>

**§ 469. The lease of premises for use as a house of prostitution.** A lease of premises for the purpose of carrying on therein the profession of a prostitute, the lessor knowing the purpose for which the premises are let, is absolutely void because of the immorality involved in the purpose of the letting. Hence, it follows that the lessor cannot recover rent in the case of a lease of a house in which prostitutes ply their trade if he knew when he leased it, the purpose for which it was to be used.<sup>30</sup> Nor can

<sup>27</sup> Thomas v. Hayward, 38 L. J. Ex. 175, L. R. 4 Ex. 311, 20 L. T. 814.

<sup>28</sup> Thomas v. Hayward, 20 L. T. N. S. 814, L. Rep. 4 Ex. 311; Wilson v. Hart, 14 L. T. Rep. N. S. 499, L. Rep. 1 Ch. 463.

<sup>29</sup> Anderson v. Miller, 96 Tenn. 35, 48, 33 S. W. Rep. 615, 54 Am. St. Rep. 812, 31 L. R. A. 604. The

action may be maintained by the landlord in his name though he has collected his insurance from a company entitled to subrogation. Anderson v. Miller, 96 Tenn. 35, 36-43, citing Perrott v. Shearer, 17 Mich. 48, 55, 56; Clark v. Wilson, 103 Mass. 219.

<sup>30</sup> Dougherty v. Seymour, 16 Colo. 289, 26 Pac. Rep. 823;

one to whom the lessor transfers the reversion during the term of a lease of the premises for use as a house of prostitution, enforce the lease or collect his rent if he actually knew of the character of the use of the premises, or where he had a reasonable opportunity to ascertain the use of the premises by the tenants and did not avail himself thereof.<sup>31</sup> Of course the mere fact that a lessee is a prostitute, a gambler or a disorderly person will not alone exempt him or her from the payment of the rent for premises actually occupied for a dwelling where he or she carries on his or her business or avocation elsewhere. It is only as to the premises which were put to an illegal or immoral use that a liability for rent can be avoided.<sup>32</sup> And rent is recoverable where the house of prostitution is within the district where the keeping of such a house is permitted by a municipal regulation.<sup>33</sup> The lease of a house for purposes of prostitution or other illegal use for a term is wholly void. The lease is not good for any period however short. Hence, such an instrument confers no right in the lessee to continue in possession and use the premises for such purpose as a tenant from month to month,<sup>34</sup> nor upon the landlord to collect rent for a short term or for use and occupation. The occupancy no matter for what period is for a purpose absolutely unlawful and the lessee not being bound to pay the rent, he acquires no rights by continuing in possession. Such a case differs *in toto* from a lease which is void because improperly executed and from one which is void under the statute of frauds where a lessee by remaining in

Ralston v. Boady, 20 Ga. 449; Fields v. Brown, 188 Ill. 111, 58 N. E. Rep. 977, reversing 90 Ill. App. 195; Kathman v. Walters, 22 La. Ann. 54; Berni v. Boyer, 90 Minn. 469, 97 N. W. Rep. 121; Ashbrook v. Dale, 27 Mo. App. 649; Ernst v. Crosby, 21 N. Y. Supp. 365, 50 N. Y. State Rep. 429; affirmed in 140 N. Y. 364, 35 N. E. Rep. 603, 55 N. Y. St. Rep. 732; Hunstock v. Palmer, 4 Tex. Civ. App. 459, 23 S. W. Rep. 294, 295; Mound v. Barker, 71 Vt. 253, 44 Atl. Rep. 346; Crisp v. Churchill, 4 R. R. 822, 1 B. & P. 340; Jen-

nings v. Throgmorton, Ry. & M. 251; Girardy v. Richardson, 1 Esp. 13, 1 Bos. & P. 341n; Bishop on Contracts, 496.

<sup>31</sup> Ernst v. Crosby, 21 N. Y. Supp. 365; affirmed in 140 N. Y. 623, 35 N. E. Rep. 603, 55 N. Y. St. Rep. 732.

<sup>32</sup> Appleton v. Campbell, 2 Car. & P. 347; Jennings v. Throgmorton, Ry. & M. 251.

<sup>33</sup> Lyman v. Townsend, 24 La. Am. 625.

<sup>34</sup> Berni v. Boyer, 90 Minn. 469, 97 N. W. Rep. 121, 122

possession and paying rent creates a lease by implication from month to month or at will. No implication of this kind will be recognized where both the subject matter and the purpose of the lease are in positive violation of law.<sup>35</sup>

**§ 470. Leases of premises for the sale of intoxicating liquors.** The question whether a lease of premises to one who carries on the sale or manufacture of intoxicating liquors therein shall be void depends wholly upon existing statutes. At common law and in the absence of a statute regulating the subject, such a lease was unquestionably valid. Where the statute expressly provides that all contracts whereby any premises are leased and the same are occupied for the sale of intoxicants shall be void, no recovery can be had upon the lease though the sale of liquors in the premises may be carried on under a license by which the

<sup>35</sup> "At common law the keeping of a house of prostitution is an indictable offense. Such places are regarded with so much disfavor that not only the keeper of the house, but also a landlord knowingly leasing the same for the purpose of bawdry is held to be guilty of a criminal offense when the house is actually put to such immoral use. \* \* \* These salutary rules have received the almost universal sanction of the courts wherever the common law has been administered. \* \* \* It is said, however, that as the written lease upon which the action is founded is silent as to the purpose for which the house was to be used, it is a valid contract, and can be enforced, notwithstanding the use to which it was known that the house would be put. The contract is *prima facie* good but extrinsic evidence shows it to have been tainted with moral turpitude, which overthrows its *prima facie* appearance and exposes its baseness and illegality. As to whether or not the house

was to be used as a bawdy house the evidence is conflicting. It was however the peculiar province of the trial judge to determine upon which side lay the greater weight." By the court in Dougherty v. Seymour, 16 Colo. 289, 26 Pac. Rep. 823. A contract which is meant to be a lease, but which is made in the form of another instrument to evade a statute invalidating leases of houses for illegal purposes will not be enforced in equity. So, parties who mean to lease and hire premises for use as a house of prostitution, and who to do so and avoid the statutory prohibition sell the house by a written agreement, the price to be paid in installments until the landlord shall have received a certain sum when he will give a deed, and take a mortgage for the balance, the contract is void and will not be enforced and they have no remedy in equity. Sprague v. Rooney, 104 Mo. 347, 16 S. W. Rep. 505, overruling Sprague v. Rooney, 82 Mo. 493.

sale becomes lawful.<sup>36</sup> On the other hand it has been held that a lease which is valid on its face is not rendered invalid because the purpose for which the leased premises are let according to the terms of the lease may, under certain circumstances according to a statute, become illegal. The presumption is that the use which is to be made of the premises by the lessee is a lawful use and this presumption is not rebutted until it is shown that the lessee intended to use the premises solely for an illegal purpose and that the lessor knew of such intention and knew the character of the purpose. Hence, where premises are let under a covenant to be used for a liquor saloon, it is no defense for the tenant to show in an action to recover rent, that they were so near a public school that they came within a statute prohibiting the granting of a license where it appeared that the lessee could have procured the transfer of a license from other premises. No presumption will be recognized in such a case that the lessee intended to violate the statute or that a license could not possibly be obtained by the lessee.<sup>37</sup> So, a lease of premises for the purpose of carrying on "a strictly first class liquor saloon" is not a lease for an unlawful purpose merely because a liquor

<sup>36</sup> Goodall v. Gerke Brewing Company, 1 Ohio, N. P. 284, 3 Ohio Dec. 58; Canfield v. Vacha, 3 Ohio N. P. 158, 1 O. L. D. 171. If a statute makes the sale of liquors illegal under certain circumstances no rent can be recovered for the use of premises where they are sold in violation of law. Sherman v. Wilder, 106 Mass. 537, 539. Where a statute makes it penal for an owner to "willfully let or suffer any other person to occupy premises which he owns for the sale of liquors" it is not necessary to show an express consent to the sale by the owner. Not to object to the illegal use implies a willingness that it shall continue for a passive indifference on the part of the owner to the tenant's illegal acts cannot be a compliance with the stat-

ute. If the landlord cannot control his tenant he must expel him and if he permits him to remain he cannot collect the rent. Mitchell v. Scott, 62 N. H. 596, 597. In Rhode Island by Pub. St. c. 80, § 4 the use of the premises by the tenant for the illegal sale of liquor annuls the lease without any act on the part of the owner who may then enter the premises without process. The statute does not justify the lessor in ejecting the lessee because the lessor is himself selling liquor illegally upon the premises though with the consent of the lessee. Allen v. Kelly, 18 R. I. 197, 30 Atl. Rep. 965.

<sup>37</sup> Shadlinsky v. Budweiser Brewing Co., 163 N. Y. 437, 57 N. E. Rep. 620, affirming 45 N. Y. Supp. 174, 17 App. Div. 470.

license has not been obtained by the lessee, where it does not appear upon the face of the lease itself that the business is to be carried on without a license.<sup>38</sup> A lease for saloon purposes which is valid when executed is not rendered invalid by the subsequent enactment of a statute prohibiting the sale of liquor absolutely. The tenant cannot in an action to recover the rent interpose the defense that the use which was intended to be made of the premises has been declared illegal by statute since the lease was executed. The adoption of a statute permitting local option after the execution of a lease, as a result of which the sale of liquor on the premises may be prohibited, does not render the lease absolutely void or exempt the tenant from paying rent though the premises had been expressly hired for use as a saloon.<sup>39</sup>

**§ 471. The use of the premises as a gambling house.** A lease of premises for gambling purposes is void and no rent is collectible thereunder where the lessor was a party to the illegal intent, *i. e.*, where he knew the purpose for which the premises were hired or are occupied.<sup>40</sup> The case is very clear where the lessor knows of the actual purpose for which the premises are hired and lets the premises in furtherance of that purpose. The evidence must, however, show affirmatively that the knowledge of the illegal purpose was actually brought home to the lessor. It will not be presumed that he in fact knew of the illegal purpose for which the premises were to be used where the lease is silent as to the purpose, or where it states that they are to be used for a proper and legal purpose.<sup>41</sup> The use of premises for an unlawful purpose without the consent of the landlord who leased them for a proper purpose has no effect on the lease. The fact that premises originally leased for a club room in doing which there is certainly nothing immoral, were subsequently converted into a gambling house does not enable a lessee to repu-

<sup>38</sup> Kerley v. Mayer, 10 Misc. Rep. 718, 31 N. Y. Supp. 818.

<sup>39</sup> Houston Ice & Brewing Co. v. Keenan (Tex. 1905) 88 S. W. Rep. 197.

<sup>40</sup> Harris v. McDonald, 79 Ill. App. 638; Ryan v. Potwin, 62 Ill. App. 134; Heidenreich v. Raggio, 88 Ill. App. 521, (Crim. Code, § 127), Updike v. Campbell, 4 E. D.

Smith, (N. Y.) 570; Edelmuth v. McGarren, 4 Daly, 467, 45 How. Prac. Rep. 191 (where by statute the selling of lottery tickets is unlawful, a lease of a store to be used for that purpose is void and the lessor cannot collect rent). See, also, Frank v. McDonald, 86 Ill. App. 336.

diate the lease where there is no evidence that the lessor knew of the unlawful object for which the premises were being used.<sup>42</sup>

**§ 472. The knowledge by the lessor that the premises are to be used for an immoral or illegal purpose.** The lessor is not precluded from recovering rent for the premises leased by him because, without his knowledge the lessee has used the premises for an immoral or an illegal purpose. His ignorance of the purpose of the lessee, if it is genuine and unintentional, will enable him to enforce his rights arising during its existence.<sup>43</sup> The scope of the inquiry as to the knowledge of the lessor of the illegal purpose of the lessee is very wide. It may be shown that prior to the letting in question the premises had been occupied for a similar illegal purpose with the landlord's consent, that the premises were well adapted for such purpose, and that the landlord had stated that the premises were very suitable for the purpose. In short, in endeavoring to ascertain the landlord's knowledge, it is permissible to prove not only his conduct and declarations at the time of the making of the lease, but his prior and subsequent conduct and declarations as well.<sup>44</sup> The fact that the lease contains a covenant against an unlawful use of the premises does not enable the landlord to recover rent for the same if he knows they are actually used by the tenant for an unlawful purpose.<sup>45</sup> Some of the authorities hold that the bare knowledge of the owner that his premises are to be used, or are being used, for an immoral or an illegal purpose is not alone sufficient to invalidate the lease without proof that the illegal use was the inducing or procuring cause of the lease and the motive in his mind prompting him to make it.<sup>46</sup> Other cases

<sup>42</sup> Gibson v. Pearsall, 1 E. D. Smith (N. Y.) 90.

<sup>42</sup> Commagere v. Brown, 27 La. Ann. 314.

<sup>43</sup> Commagere v. Brown, 27 La. Ann. 314; Gibson v. Pearsall, 1 E. D. Smith (N. Y.) 90; Zink v. Grant, 25 Ohio St. 352, 354; Ryan v. Potwin, 62 Ill. App. 134; *contra*, Almy v. Greene, 13 R. I. 350; Miller v. Maguire, 18 R. I. 770, 30 Atl. Rep. 999, holding knowledge of the immoral purpose of the lessee is immaterial.

<sup>44</sup> Sherman v. Wilder, 106 Mass. 537, 540.

<sup>45</sup> Sherman v. Wilder, 106 Mass. 537, 540.

<sup>46</sup> Miller v. Maguire, 18 R. I. 770, 36 Atl. Rep. 966; Almy v. Greene, 13 R. I. 350, 353; see, also, as to illegal contracts of sale involving the same question, Dater v. Earl, 3 Gray (Mass.) 482, 483; Kreiss v. Seligman, 8 Barb. (N. Y.) 439; Aiken v. Blaisdell, 41 Vt. 655, 669; Gaylord v. Soragen, 32 Vt. 110; Hill

hold that the lessor's knowledge of the immoral or illegal use is enough though he has no hand in making it. And where one purchases a house which at the time is occupied under a lease from his grantor as a house of prostitution, he cannot collect rent from the lessee, though by the terms of the lease, it was provided that the house was to be "used as a dwelling house only;" and also that the lessee would obey all lawful orders of the city government.<sup>47</sup> If a grantee, having an opportunity to ascertain for what purpose the property was being used while he was negotiating for its purchase, fails to do so, he cannot subsequently enforce an immoral or illegal lease against a lessee in possession when he purchased. He has only the rights against such lessee that were enjoyed by his grantor.<sup>48</sup>

v. Spear, 50 N. H. 253, 265, in which the rule is stated to be that though the vendor's knowledge of the unlawful intent of the vendee in purchasing the goods, will not prevent the vendor from recovering the price yet if it appears that the vendor in any way aided the vendee in his unlawful purpose, he cannot maintain an action on the contract.

<sup>47</sup> Ernst v. Crosby, 140 N. Y. 364, 367, 35 N. E. Rep. 603. The lease of a house for a lawful purpose is not invalidated by its subsequent use by the tenant for an unlawful purpose with the knowledge of the landlord, unless it is shown that the original hiring for a lawful purpose was merely a subterfuge for the use of the premises afterwards for an improper purpose. But if after knowledge of the illegal use of the house by the tenant has come to the attention of the landlord he shall acquiesce in the use he cannot collect subsequently accruing rents. Kessler v. Pearson (Ga. 1906) 55 S. E. Rep. 963.

<sup>48</sup> The reputation of the house after the execution of the lease

was admitted in evidence in Egan v. Gordan, 65 Minn. 505, 68 N. W. Rep. 103. Upon the general question of the right to recover for goods sold for an illegal purpose of which the vendor is cognizant Mr. Justice Bradley in delivering the opinion in Hanauer v. Doane, 12 Wall. (U. S.) 342 on page 346 says "With whatever impunity a man may lend money or sell goods to another who he knows intends to devote them to a use that is only *malum prohibitum*, or of inferior criminality, he cannot do it, without turpitude, when he knows or has every reason to believe, that such money or goods are to be used for the perpetration of a heinous crime, and that they were procured for that purpose. In the words of Chief Justice Eyre in Lightfoot v. Tenant, Bos. & Pul. 551, 556, 'the man who sells arsenic to one who, he knows, intends to poison his wife with it, will not be allowed to maintain an action on his contract. The consideration of the contract, in itself good, is there tainted with turpitude which destroys the

**§ 473. The leasing of premises for immoral purposes a crime.** In some of the states the leasing of premises with the knowledge on the part of the lessor that they are to be used for the purpose of prostitution constitutes a crime by statute. The statutes, which vary somewhat in their terms, must in each instance be consulted. Generally one who owns or controls a house and who with knowledge of the purpose to which it is to be put, leases it for the purpose of a house of prostitution or for a disorderly house or, having leased it for a proper and legal purpose, knowingly permits it to be used by the lessee for an improper purpose, is indictable.<sup>49</sup> The law requires proof beyond a reasonable doubt that the lessee knew the premises were to be used for an improper purpose. It must also be proved that the landlord had such control of the premises that his mere oral dissent or direc-

whole merit of it. \* \* \* No man ought to furnish another with the means of transgressing the law, knowing that he intends to make that use of them.' On this declaration Judge Story remarks: 'The wholesome morality and enlarged good policy of this passage makes it almost irresistible to the judgment and indeed the reasoning seems positively irresistible. Can a man furnish another with the means of committing murder, or any abominable crime knowing that the purchaser procures them, and intends to use them for that purpose, and then pretend that he is not a participant in the guilt? Can he wrap himself up in his own selfishness and heartless indifference and say what business is that of mine? Am I the keeper of another man's conscience?' No one can hesitate to say that such a man voluntarily aids in the perpetration of the offence and morally speaking is quite as guilty as the principal offender."

<sup>49</sup> Cahn v. State, 110 Ala. 56, 20 So. Rep. 380; McAlister v. Clark, 33 Conn. 91; Territory v. Stone, 2 Dak. 155, 4 N. W. Rep. 697; Scott v. State, 29 Ga. 263; Kessler v. State, 119 Ga. 301, 46 S. E. Rep. 408; State v. Abraham, 6 Iowa, 117, 71 Am. Dec. 390; Ross v. Com., 2 B. Mon. (Ky.) 417; Rhodes v. Com., 7 Ky. Law Rep. 520, 7 Cr. Law Mag. 794, 15 Ky. Law Rep. 333; Ford v. Com., 11 Ky. Law Rep. 860; State v. Frazier, 79 Me. 95, 8 Atl. Rep. 347; Smith v. State, 6 Gill (Md.) 425; Com. v. Harrington, 3 Pick. (Mass.) 26; People v. Erwin, 4 Denio (N. Y.) 126; People v. O'Melia, 67 Hun 653, 22 N. Y. Sup. 465; State v. Skith, 15 R. I. 24, 22 Atl. Rep. 1119; Mitchell v. State, 34 Tex. Cr. Rep. 311, 30 S. W. Rep. 810. This offense is usually under the statutes a misdemeanor in which all concerned are principals. Kessler v. State, 119 Ga. 301, 46 S. E. Rep. 408.

tion would amount to a prohibition of the forbidden use. Of course, it is never a crime to let premises to prostitutes for a quiet and orderly occupation by them, or to permit a house to be visited by disreputable persons if they resort there for proper and innocent purposes.<sup>50</sup>

**§ 474. Criminal liability of the landlord.** Where a statute makes it a misdemeanor for any person owning or controlling a house to allow to be sold therein any ardent or vinous spirits a landlord who leases his house for a lawful purpose is not bound to interfere and invoke the law when he subsequently finds that his tenant is using the house for the sale of intoxicating liquors therein. His non-interference does not render him liable or involve him in the guilt of his tenant for the enforcement of the law is primarily the duty of the proper officers appointed for that purpose and a private citizen is not called upon to embroil himself in personal difficulties and lawsuits solely for the public benefit.<sup>51</sup> It might have been his moral duty to interfere and oust the tenant who was using the premises for an unlawful purpose but his sanction and consent cannot be inferred from his failure to do so. It might be otherwise where the landlord knowingly rents the premises for the unlawful purpose or advised or participated in his operation for such purpose.<sup>52</sup>

**§ 475. The construction of a statute providing for equitable jurisdiction of leases for gambling purposes.** In Illinois there is a statute which provides that judgments recovered upon leases of premises for gambling purposes may be set aside in equity. Under this statute the jurisdiction of equity is broad. It has power to set aside the judgment upon a proper case where it is proved that the property was used for gambling purposes though the illegality of the lease was neither set up nor adjudicated in the action in which the judgment for rent was recovered. Nor is it material in equity that the lessor knew of the purpose for which the premises were leased before he recovered a judgment

<sup>50</sup> State v. Smith, 15 R. I. 24, 22 339; see, also, Robinson v. State, Atl. Rep. 1119. 24 Tex. 152.

<sup>51</sup> Crocker v. State, 49 Ark. 60, 52 State v. Abrahams, 6 Iowa, 4 S. W. Rep. 197; Koester v. 117, 4 Iowa, 541 State, 36 Kan. 27, 12 Pac. Rep.

for the rent. The court of equity, however, cannot while setting aside the judgment decree that rents which have been already paid for the use of the premises shall be returned, even when the collection of the rent was brought about by a levy under the former judgment.<sup>53</sup>

<sup>53</sup> *Boddie v. Brewer & Hoffman* N. E. Rep. 394, affirming 107 Ill. Brewing Company, 204 Ill. 352, 68 App. 357.

## CHAPTER XXI.

### THE RESPECTIVE RESPONSIBILITIES AND RIGHTS OF THE PARTIES AS TO THE CONDITION OF THE PREMISES.

- § 477. The fitness of the premises.
- 478. The distinction between unfurnished and furnished dwellings and rooms.
- 479. Fraudulent misrepresentations and concealment of defects.
- 480. The responsibility of the landlord for a nuisance.
- 481. The drainage of surface water.
- 482. Contagious diseases.
- 483. Defective plumbing and water supply.
- 484. The joint liability for nuisance of the lessor and lessee.
- 485. The repairs of that portion of the premises which is in the exclusive control of the lessor.
- 486. The negligence of the landlord in making repairs.
- 487. The landlord's liability in the case of apartment buildings and flats.
- 488. Knowledge or notice of the defects by the landlord.
- 489. The liability of the landlord for the condition of the outside walls, roofs and cornices.
- 490. The responsibility for injuries caused by ice and snow falling from the roof.
- 491. Falling sign under the control of the landlord.
- 492. The landlord's duty to light halls and stairways.
- 493. The landlord's liability for halls and stairways.
- 494. The landlord's liability for the condition of elevators used by the tenants and others.
- 495. Use of common hallways or stairs by a tenant is not contributory negligence.
- 496. Snow and ice accumulating in passage ways.
- 497. The common use by the tenants of a yard of an apartment house.
- 498. Defective coal hole covers and cellar gratings.
- 499. The use of gas, natural or artificial, by the landlord.
- 500. Negligence in the care of steam heating apparatus and chimneys.
- 501. The negligence of the landlord as regards falling ceilings.
- 502. The landlord's liability to a member of a lodge which is his tenant.
- 503. The contributory negligence of the tenant.
- 504. Repairs by the landlord or his agent before or after the accident.

- § 505. The liability of a tenant for negligence.
- 506. Liability of tenants to one another for negligence.
- 507. The liability for damages to a tenant on a lower floor by the overloading of an upper floor.
- 508. Injuries caused by overflow of water on upper floor
- 509. The tenant's liability for fire.

**§ 477. The fitness of the premises.** In the lease of a factory store, dwelling or other building, there is no implied warranty on the part of the landlord that the building is safe, tenantable or reasonably suitable for the purpose for which it is to be used by the lessee, nor is there any implied warranty that it shall continue to be fit for the purpose to which the lessee intends to put it. In the absence of fraud or concealment by the landlord at the time of the letting of the condition of the building, the rule of *caveat emptor* applies.<sup>1</sup> Thus,

<sup>1</sup> Purcell v. English, 86 Ind. 34, 37; Seiber v. Blanc, 76 Cal. 173; Brewster v. Fremery, 33 Cal. 341; Howell v. Schneider, 24 App. D. C. 532; Purcell v. English, 86 Ind. 34, 37; Borgard v. Gale, 205 Ill. 511, 68 N. E. Rep. 1063, 107 Ill. App. 128; Lucas v. Coulter, 104 Ind. 81, 3 N. E. Rep. 622; Barman v. Spencer (Ind.) 49 N. E. Rep. 9, 12; Bentley v. Taylor, 81 Iowa, 306, 39 N. W. Rep. 267; King v. Creekmore, 25 Ky. Law Rep. 1292, 77 S. W. Rep. 689; Libbey v. Tilford, 48 Me. 316, 77 Am. Dec. 229; Bennett v. Sullivan, 100 Me. 118, 60 Atl. Rep. 886; Roth v. Adams, 185 Mass. 341, 70 N. E. Rep. 445, 446; Stevens v. Pierce, 151 Mass. 207, 23 N. E. Rep. 1006; Bertie v. Flagg, 161 Mass. 504, 37 N. E. Rep. 572; Bowe v. Hunking, 135 Mass. 580, 585; Woods v. Naumkeag Mfg. Co., 134 Mass. 357; Dutton v. Gerrish, 9 Cush. (Mass.) 89, 55 Am. Dec. 45; Wilkinison v. Clauson, 29 Minn. 91, 12 N. W. Rep. 147; Krueger v. Ferrant, 29 Minn. 385, 13 N. W. Rep. 158; Harrel v. Fall, 63 Minn. 520, 65 N. W. Rep. 913; Kerr v. Merrill, 4 Mo. App. 592; Fehlhauer v. City of St. Louis, 178 Mo. 635, 77 S. W. Rep. 843; York v. Stewart, 21 Mont. 515; Clarke v. Spaulding, 20 N. H. 313, 316; Davis v. George, 67 N. H. 393, 39 Atl. Rep. 979; Murray v. Albertson, 50 N. J. Law, 167, 13 Atl. Rep. 394; Dennison v. Grove, 53 N. J. Law, 144, 19 Atl. Rep. 186; Mullen v. Rainier, 45 N. J. Law, 520; Sherman v. Ludin, 79 App. Div. 37, 79 N. Y. Supp. 1066; O'Brien v. Capwell, 59 Barb. (N. Y.) 497; Loupe v. Genin, 45 N. Y. 119; Post v. Vetter, 2 E. D. Smith (N. Y.) 248; Jaffe v. Harteau, 56 N. Y. 398, 15 Am. Rep. 438; Mayer v. Moller, 1 Hilt. (N. Y.) 491; Robins v. Mount, 27 N. Y. Super. Ct. Rep. 553; Lynch v. Speed, 15 Daly, 207, 4 N. Y. Supp. 556; Daly v. Wise, 132 N. Y. 306, 30 N. E. Rep. 837; Flannery v. Simons, 93 N. Y. Supp. 544; Carey v. Kreizer, 57 N. Y. Supp. 79, 26 Misc. Rep. 755;

for illustration, a lease of premises known as the "Salt furnace property," with the appurtenances, does not by implication create a covenant that there are salt wells on the premises or that they are of any particular capacity, or that they shall yield any particular quantity of salt.<sup>2</sup> Nor does a lease of land to mine coal create any covenant that the land contains coal. For the fact that a tenant agrees with his landlord that he will use the leased premises for a particular business or purpose creates no implied agreement on the part of the landlord that they are fit for that particular business at the execution of the lease.<sup>3</sup> The contrary, however, has been held; thus, where the premises were leased for a "cold storage warehouse," and it was also agreed that the premises should be used for that purpose only the court held that there was an implied warranty of fitness for the purpose to which the premises were to be devoted by the tenant.<sup>4</sup> This rule is, however, restricted in its application and in the case cited it will be found that the premises were so incomplete that the tenant could not examine them to ascertain their condition and whether they were fit for the purposed use or not. And it has also been held that a person who hires a building for storage purposes to which it appears to be adapted, need not at his own peril find out its capacity.<sup>5</sup> If,

**McGlashan v. Tallmadge**, 37 Barb. (N. Y.) 313; **Schermerhorn v. Gouge**, 13 Abb. Prac. (N. Y.) Rep. 313; **Meeks v. Bowerman**, 1 Daly (N. Y.) 99; **Robbins v. Mount**, 27 N. Y. Super. Ct. Rep. 553; **Gaither v. Hascall-Richards Steam Generator Co.**, 121 N. Car. 384; **Shinkle v. Birney**, 68 Ohio St. 328, 334, 67 N. E. Rep. 715; **Hazlett v. Powell**, 30 Pa. St. 393; **Swibill v. Brown**, 1 Pa. Co. Ct. Rep. 350; **Harlan v. Navigation Co.**, 35 Pa. St. 287; **Whitehead v. Comstock Co.**, 25 R. I. 423, 56 Atl. Rep. 416, 417; **Railton v. Taylor**, 20 R. I. 279, 38 Atl. Rep. 980, 39 L. R. A. 246; **Schmalzried v. White**, 97 Tenn. 36, 36 S. W. Rep. 393; **Wilcox v. Cate**, 65 Vt. 478, 26 Atl. Rep. 1105; **Clifton v. Mont-**

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40 W. Va. 207, 215, 21 S. E. Rep. 858, 52 Am. St. Rep. 872, 33 L. R. A. 449; **Felton v. Cincinnati**, 95 Fed. Rep. 336, 37 C. C. A. 88; **Doyle v. Union Pac. R. R. Co.**, 147 U. S. 413, 427, 13 S. Ct. 333, 37 Law. ed. 223; **Viterbo v. Friedlander**, 120 U. S. 707, 712; **Cartier v. Durocher**, Rap. Jud. Que. 22 C. S. 225.

<sup>2</sup> **Clifton v. Montague**, 40 W. Va. 207, 215, 21 S. E. Rep. 858, 52 Am. St. Rep. 872, 33 L. R. A. 449; **Clark v. Babcock**, 23 Mich. 164.

<sup>3</sup> **Lyons v. Gavin**, 88 N. Y. Supp. 252.

<sup>4</sup> **Hunter v. Porter**, 10 Idaho, 72, 86, 77 Pac. Rep. 434.

<sup>5</sup> **Machen v. Hopper**, 73 Md. 342, 21 Atl. Rep. 67.

however, the lessor in letting the premises for a particular use agrees to keep them in repair, it is his duty to put them in such repair as is required for the use for which they are intended.<sup>6</sup> It is always competent to have the parties of a lease to covenant that the premises shall be fit and suitable for occupation for a particular purpose. The lessor will then be bound to deliver the premises to the lessee in a condition suitable for that purpose. The lessee on his discovery that the premises are not suitable for his business may, after he has notified the lessor to that effect and the latter has had a reasonable time to repair, abandon the premises and refuse to pay rent.<sup>7</sup> For where a landlord let a building and by the lease limits its use to a purpose specified therein and the tenant does no more than to agree to keep the premises in as good repair as when taken, it may be implied that the landlord recommends the building as suitable for the proposed use in the condition as it then is in the absence of a contrary agreement in the lease.<sup>8</sup> A tenant is entitled to receive the premises in the same condition as they are when the lease was executed. An alteration of the building by the landlord between the execution of the lease and the entry of the tenant, if it unfits the building for the use which the tenant expects to make of it, releases him from all obligations to enter. And not only is the landlord prevented from making material alterations in the premises, but he must see to it at his peril that they continue in the same condition as they were at the execution of the lease down to the entry by the tenant. Hence, if an outgoing tenant makes material changes in the condition of the building between the execution of the lease and the entry of the incoming tenant, the latter need not accept the premises though the alterations were made without the knowledge or consent of the landlord.<sup>9</sup>

**§ 478. The distinction between unfurnished and furnished dwellings and rooms.** It is well settled by the authorities in both England and America that in the case of a dwelling

<sup>6</sup> *Piper v. Fletcher*, 115 Iowa, 263, 88 N. Y. Rep. 380.

<sup>7</sup> *Young v. Collett*, 63 Mich. 331, 29 N. W. Rep. 850.

<sup>8</sup> *Tyler v. Disbrow*, 40 Mich. 415; *Smith v. Marrable*, 11 M. &

W. 5; *West Side Sav. Bank v. Newton*, 76 N. Y. 616; *Salisbury v. Marshal*, 4 C. & P. 65.

<sup>9</sup> *Rosenstein v. Cohen*, 96 Minn. 336, 104 N. W. Rep. 965.

house which is let unfurnished there is no implied covenant that it is in a habitable condition when let or that it is suitable for dwelling purposes.<sup>10</sup> In the absence of fraud or misrepresentation by the landlord the tenant takes it as it is, and must determine for himself whether it is and will be suitable for his use as a dwelling. The rule of *caveat emptor* applies to the case. Many of the authorities, however, draw a distinction between the letting of a dwelling house or apartment in an unfurnished condition and in a furnished condition. In England it has been repeatedly held that there is an implied covenant in a lease of a furnished house for a dwelling that it is in a proper and suitable condition for occupancy as a dwelling house.<sup>11</sup>

<sup>10</sup> Fisher v. Lighthall, 4 Mackey (D. C.) 82, 54 Am. Rep. 258; Lucas v. Coulter, 104 Ind. 81, 3 N. E. Rep. 622; McKenzie v. Cheetham, 83 Me. 543, 22 Atl. Rep. 469; McKeon v. Cutter, 156 Mass. 296, 31 N. E. Rep. 289; Ingalls v. Hobbs, 156 Mass. 348, 350, 31 N. E. Rep. 386, 16 L. R. A. 51, 32 Am. St. Rep. 460; Stevens v. Peirce, 151 Mass. 207, 209, 23 N. E. Rep. 1006; Foster v. Peys, 9 Cush. (Mass.) 242, 247, 57 Am. Dec. 43; Dutton v. Gerrish, 9 Cush. (Mass.) 89; Blake v. Dick, 15 Mont. 236, 38 Pac. Rep. 1072, 48 Am. St. Rep. 671; Cleves v. Willoughby, 7 Hilt. (N. Y.) 83; Daly v. Wise, 132 N. Y. 306, 30 N. E. Rep. 837, 16 L. R. A. 236; Wallace v. Lent, 29 How. Pr. (N. Y.) 289, 1 Daly, 481; Prahar v. Tousey, 87 N. Y. Supp. 845; Smith v. Donnelly, 87 N. Y. Supp. 893; Reeves v. McComeskey, 168 Pa. St. 571, 32 Atl. Rep. 96, 36 W. N. C. 394; Hollis v. Brown, 159 Pa. St. 360, 28 Atl. Rep. 360; Dowling v. Nuebling, 97 Wis. 350, 72 N. W. Rep. 871; Auer v. Vahl, 129 Wis. 635, 109 N. W. Rep. 529; Lane v. Cox (1897) 1 Q. B. 415; Sutton v. Temple, 12 Mee. & Wel.

52, 63; Hart v. Windsor, 12 Mee & Wel. 68, 86; Surplice v. Farnsworth, 7 M. & G. 576. The rule of the text applies to the letting of separate rooms in tenement house if they pass out of the control of the landlord and into the exclusive possession of the tenant. McKeon v. Cutter, 156 Mass. 296, 297, 31 N. E. Rep. 589.

<sup>11</sup> Campbell v. Lord Wenlock, 4 F. & F. 716; Wilson v. Hatton, L. R. 2 Exch. Div. 336; Smith v. Marrable, 11 Mee. & W. 5, 9; Sutton v. Temple, 12 Mee. & W. 52, 63; Hart v. Windsor, 12 Mee. & W. 68, 86, 87; Bird v. Lord Treveille, 1 C. & E. 317; Charsley v. Jones, 53 J. P. 280; In Smith v. Marrable, 11 Mee. & W. 5, on p. 11, Lord Abinger states that no precedents were necessary for him to lay down the rule pronounced in the case and that common sense alone was all the court needed to enable it to decide the case. He raises the question whether an occupant of a ready furnished house on finding that a prior occupant had recently died in it of the plague or scarlet fever would not be legally justified in vacating it and cancelling the

The English rule has been followed<sup>12</sup> in some states and approved in others.<sup>13</sup> The doctrine of an implied covenant or agreement that a ready furnished house let for a dwelling is suitable for its purpose and ready and safe for an immediate occupancy is based largely upon the theory that the main element present in the minds of the parties is the immediate use of the premises by the lessee for a particular purpose clearly understood. One who hires an unfurnished dwelling may have in mind the postponement of his entry into possession until he can make such alterations and repairs as will render the premises suitable for him to move his furniture into it. He may know the unsuitable state of the premises as a dwelling and may intend to remedy any defects at his own expense. On the other hand one who hires a house provided with all furniture and appointments for immediate occupancy may fairly be assumed to contract with the intention of using the furniture and the house as he finds it and without alterations or repairs on his part. So, too, an important portion of the rent which he pays or agrees to pay is for the use of the furniture and fittings of the house. And these will be of no benefit to him unless he can promptly and safely enter upon their continuous and proper enjoyment. For it is very difficult if not impossible for a tenant to determine whether a dwelling house and the furniture in it are fit and suitable in a case where he must go into immediate possession, though easy to do so in the case of an unfurnished building to be entered in the future. If, however, the lessor of a dwelling knowing it has secret defects which unfit it for a residence fraudulently states to a prospective tenant that it is in a good and habitable condition in general, or fraudulently conceals the particular defects in reply to the tenant's inquiries, the latter may abandon the house for such cause without liability for rent.<sup>14</sup> Upon the letting of a furnished house

lease and answer the question in  
the affirmative.

132 N. Y. 306, 311, 30 N. E. Rep.  
837, 16 L. R. A. 236.

<sup>12</sup> Dutton v. Gerrish, 9 Cush. 89; Ingalls v. Hobbs, 156 Mass. 348, 350, 31 N. E. Rep. 286, 16 L. R. A. 51, 32 Am. St. Rep. 260.

<sup>13</sup> Edwards v. McLean, 122 N. Y. 302. See, also, Daly v. Wise,

<sup>14</sup> Daly v. Wise, 132 N. Y. 306, 30 N. E. Rep. 837; Cesar v. Kartutz, 60 N. Y. 229. "A broad distinction in this regard is suggested between a lease of a furnished and a lease of an unfurnished house, which, on principle is not

for immediate occupation with an express condition that it is fit for occupation, if it is not so, and is at once given up on that account, the landlord cannot recover either rent or for use and occupation. On such a contract whether express or implied, it is a breach of the condition if the house is so infested with bugs as to render it unfit for occupation, and as the condition applies to the whole house, it is a breach if any of the rooms are in that state. But it must appear that the nuisance exists to a serious and substantial extent, and is such as the tenant cannot reasonably be expected either to endure or to extirpate.<sup>15</sup>

apparent. If the landlord knows that the tenant proposes to occupy the house for a term of years as a place for the accommodation of the travelling public, why should the fact that the landlord also leases to him the furniture imply an additional agreement on his part that the house is suitable for hotel purposes or for habitation? Want of repair and structural defects in the house do not depend upon the furnishings, and there is no more reason why a landlord should bind himself by a warranty against such imperfections in a lease of a furnished house than there is in a lease of an unfurnished house? To hold that such a warranty is implied in the one case, and not in the other would introduce an arbitrary distinction not based on any apparent practical reason and not within the contemplation of the parties to such contract." By the court in *Davis v. George*, 67 N. H. 393, 39 Atl. Rep. 979. In *Blake v. Dick*, (Mont.) 38 Pac. Rep. 1072 where a tenant hired a dwelling house in warm and dry weather and subsequently during a rainstorm a very large quantity of water and filth flowed into the cellar diminishing his enjoyment of the premises and endan-

gering his health it was held not to be the duty of the landlord to disclose the liability to floods to the tenant when the tenant had inspected the premises.

<sup>15</sup> *Campbell v. Wenlock*, 4 F. & F. 716. "With respect to the other and principal question in this case, viz., whether a contract or condition is implied by law, on a demise of land, that it shall be reasonably fit for the purpose for which it is taken, if the question were *res integra*, I should entertain no doubt at all that no such contract or condition is implied in such a case. The word 'demise' certainly does not carry with it any such implied undertaking. The law merely annexes to it a condition that the party demising has a good title to the premises, and that the lessee shall not be evicted during the term. If it included any such contract as is now contended for, then in every farming lease, at a fixed rent, there would be an implied condition that the premises were fit for the purposes for which the tenant took them, and it is difficult to see where such a doctrine would stop." By Park, B., in *Sutton v. Temple*, 12 Mees. & W. 52. "It is a general rule well established by the decisions of

**§ 479. Fraudulent misrepresentations and concealment of defects.** The landlord upon renting the premises is not bound to point out patent defects which exist and which may readily be discovered by the tenant by reasonable examination.<sup>16</sup> It is the duty of the tenant to discover or to attempt to discover patent defects by a personal examination though he may be absolved from this obligation by the statement of the landlord that no defects exist. As to all patent defects which may be discovered by an examination of the premises the rule of *caveat emptor* applies. The tenant will be charged with constructive notice or knowledge of patent defects which exist in that portion of the premises leased to and actually occupied or used by him.<sup>17</sup> As to concealed defects attended with personal danger to the tenant and which no examinations upon his part would reveal, the rule is otherwise. The landlord is bound to disclose concealed defects if their existence is known to him at the date of the letting provided they are such as the incoming tenant would not discover by a reasonable inspection in order that the latter may guard against them.<sup>18</sup> Where a landlord knows the premises which he is about to let are defective and in an unsafe and dangerous condition, and especially if such dangerous or defective place is not obvious, or is not discoverable by the tenant by the exercise of ordinary care, and the landlord does not inform the tenant of the defective or dangerous place and injury is occasioned thereby to the tenant or a member of his family who is

this court, that the lessee takes an estate in the premises hired, and takes the risk of the quality of the premises in the absence of an express or implied warranty by the lessor or of deceit. \* \* \* The rule of *caveat emptor* applies, and it is for the lessee to make the examination necessary to determine whether the premises he hires are safe and adapted to the purposes for which they are hired." By Devens, J., in Cowen v. Sunderland, 145 Mass. 364, 14 N. E. Rep. 117.

<sup>16</sup> Boggard v. Gale, 107 Ill. App. 128.

<sup>17</sup> Daley v. Quick, 99 Cal. 179,

33 Pac. Rep. 859; Hamilton v. Feary, 8 Ind. App. 615, 35 N. E. Rep. 48; Hedekin v. Gillespie, 33 Ind. App. 650, 72 N. E. Rep. 143 (defect in sidewalk). Flaherty v. Nieman, 125 Iowa, 546, 101 N. W. Rep. 280; Whitmore v. Orono Pulp & Paper Co., 91 Me. 297, 298, 40 L. R. A. 377, 39 Atl. Rep. 1032; Moynihan v. Allyn, 162 Mass. 270, 38 N. E. Rep. 497; Booth v. Merriam, 155 Mass. 521, 30 N. E. Rep. 85; Speckman v. Boehm, 36 App. Div. 262, 56 N. Y. Supp. 758, 90 N. Y. St. Rep. 758.

<sup>18</sup> Steefel v. Rothschild, 179 N. Y. 273, 72 N. E. Rep. 112.

not aware of such defective or dangerous place while in the exercise of ordinary care, the landlord is liable in damages.<sup>19</sup> If, therefore, the landlord shall remain silent when it is his duty to speak about the defective condition of the premises or if he expressly or by implication misrepresents the actual condition of the premises either as to patent or latent defects he will be liable to the tenant for all the injuries which naturally result from his silence or misrepresentation.<sup>20</sup> Though in the absence of fraud or warranty a landlord is not liable on his contract to a tenant for injuries resulting from a defective condition of the leased premises, a liability arises out of the wrong of the landlord in leasing premises dangerous at the time where danger is not patent, but is known to the landlord, or should be known to him by the exercise of reasonable care and diligence, and could not be ascertained by the tenant by the exercise of reasonable care and diligence.<sup>21</sup> So, a landlord who, with knowledge that his de-

<sup>19</sup> *Moore v. Parker*, 63 Kan. 52, 64 Pac. Rep 975, 976, 53 L. R. A. 778.

<sup>20</sup> *Boggard v. Gale*, 107 Ill. App. 128; *Blake v. Ranous*, 25 Ill. App. 486; *Pierce v. Hedden*, 105 La. 294, 29 So. Rep. 734; *Watson v. Shackford v. Coffin*, 95 Me. 69, 49 Atl. Rep. 57; *Howell v. Schneider*, 24 App. D. C. 532.

<sup>21</sup> *Edwards v. Railroad Co.*, 98 N. Y. 245, 50 Am. Rep. 696; *Coke v. Gutkiese*, 80 Ky. 598, 44 Am. Rep. 499; *Steefel v. Rothschild*, 179 N. Y. 273, 72 N. E. Rep. 112, reversing 82 N. Y. Supp. 1116. "A landlord is not an insurer or warrantor nor is he compelled to exercise constant care and inspection; but if he knows that the premises which he is about to let are in a dangerous and defective condition and especially if such dangerous and defective place is not obvious, or is not discoverable to the tenant by the use of ordinary care and he does not inform the tenant of such dangerous or defective

place and injury is occasioned thereby to the tenant or to a member of his family who is not aware of such dangerous or defective place while in the exercise of ordinary care the landlord is liable in damages. The law requires good faith on the part of the landlord to the tenant." *Moore v. Parker*, 63 Kan. 52, 64 Pac. Rep. 975, 53 L. R. A. 778, in which it appeared that the defect existed when the premises were leased and the landlord knew of it and concealed it from his tenant, it being a defect that the tenant could not have discovered by the use of ordinary care. The court further said "The rule seems to be that in the absence of a contract to repair or a warranty of condition both landlord and tenant must use ordinary care and diligence. If the tenant neglects such ordinary care and diligence to ascertain the condition of the premises or knowing their condition assumes the risk he cannot

mised premises are infected with a contagious disease, leases the same but does not inform the tenant of their infected condition, will be responsible for injuries resulting therefrom to the tenant or to the guests of the tenant, or to any member of the tenant's family. It must appear, however, both in the pleadings and in the proof that the landlord had actual knowledge of the dangerous condition of the premises when he leased them. It must also appear that the premises were in fact infected for this does not follow from the fact that at some time prior to the letting there was a death in the house from a contagious disease.<sup>22</sup> The fact that between the date of the execution of a lease and the date upon which the tenant enters upon the premises, an infectious disease breaks out in the premises which may depreciate its rental value does not relieve the tenant from his obligations to pay rent. In the absence of an express covenant to that effect the landlord will not be understood to warrant that premises shall remain free from infectious diseases during the term. If the landlord knows that the premises are at the time of the letting infected with disease as where, for example, they had prior to the letting been occupied as a small pox hospital and he conceals the fact from the incoming tenant, he might be liable for the consequences of his conduct in case the tenant or any member of the family of the tenant should contract that disease. But the landlord will in no case be liable to a tenant merely because an infectious disease breaks out in the premises during the term, nor *a fortiori* will he be any more than

recover as against the landlord. On the other hand if the landlord actually knows they are unsafe and conceals or misrepresents their condition then he is liable the tenant being in no fault." And in *Edwards v. Railroad Company*, 98 N. Y. 245, 249, 50 Am. Rep. 659, the court said: "The responsibility of the landlord is the same in all cases. If guilty of negligence or other delictum which leads directly to the accident and wrong complained of he is liable. It not so guilty no liability attaches. If he lets a building for a warehouse,

knowing that it is so weak and imperfectly constructed that the floors will break down from the weight necessarily to be placed upon them his negligence imposes liability upon him for injury to the person or property of any one who may be upon the premises using them for the purpose for which they are demised."

<sup>22</sup> *Davis v. Smith*, 26 R. I. 129, 58 Atl. Rep. 630. See also *Cutter v. Hamlen*, 147 Mass. 471, 18 N. E. Rep. 397, as to diphtheria caused by defective drains.

he would be liable were his tenant to contract such a disease by reason of it spreading to his premises from another house in the neighborhood. To hold that the tenant in such case would be relieved from the payment of rent would in times of epidemics of contagious diseases nullify almost all leases.<sup>23</sup> Where the landlord knows that the water supply for the premises leased is polluted by some cause which it is within his power to remove he will be liable to the tenant as for a nuisance. Where a well on the demised premises used by the tenant was polluted by a dead dog which fact the lessor well knew but failed to so inform the lessee, he will be liable to the lessee for all injuries which naturally result therefrom. It is the duty of the lessor to communicate his knowledge to the lessee as soon as he acquires it. The lessee would then have the right to regard the presence of the carcass of the animal in the well as a nuisance, constituting an eviction and justifying his removal from the premises. The fact that the landlord did not know when he leased the premises that the water was polluted does not release him from his obligation to inform the tenant of what he learned as soon as he did know it.<sup>24</sup>

<sup>23</sup> Edwards v. McLean, 122 N. Y. 302, 25 N. E. Rep. 583, affirming 55 N. Y. Super. Ct. 126.

<sup>24</sup> Maywood v. Logan, 73 Mich. 135, 43 N. W. Rep. 1025. In Wilcox v. Hines, 100 Tenn. 538, 46 S. W. Rep. 297, the court said, "although in the absence of fraud or warranty a landlord is not liable on his contract to a tenant for injuries resulting from a defective condition of the leased premises, the liabilities arise out of the wrong of the landlord in leasing premises dangerous at the time, where the danger is not patent but is known to the landlord or could be known to him by the exercise of reasonable care and diligence, and could not be ascertained by the tenant by the exercise of reasonable care and diligence." In Edward v. R. R. Co., 98 N. Y. 245, on page 249,

it was said "The responsibility of the landlord is the same in all cases. If guilty of negligence or other delictum which leads directly to the accident and wrong complained of he is liable, if not so guilty no liability attaches to him. If he lets a building for a warehouse, knowing that it is so weak and badly constructed that the floors will break down from the weight necessarily to be placed upon them, his negligence places the liability upon him for injuries to the person or property of any one who may be upon the premises using them for the purposes for which they are demised." In the case of Moore v. Parker, 63 Kan. 52, 64 Pac. Rep. 975, the court held that where a landlord rented a farm and knew that the tenant was going to occupy it for the purpose

**§ 480. The responsibility of the landlord for a nuisance.** The landlord who lets the premises in a dangerous condition or with an existing nuisance thereon, or re-lets them after the tenant has created a nuisance thereon may be liable for injuries resulting from the dangerous condition or nuisance. The rule is not confined to what may be called technically a nuisance. It extends to any unsafe or dangerous condition of the premises. Thus, the owner of premises who, knowing them to be unsafe and dangerous, demises them in that condition without providing for their repair will be liable for damages which are caused by the injury which is the natural consequence of their dangerous condition.<sup>25</sup> The landlord will be liable for injuries caused by the nuisance which arises after he has leased the premises and given up possession to a tenant.<sup>26</sup> He may, however, relieve himself of the liability to third persons for the nuisance by an agreement with his tenant that the latter shall repair the

for which farms are generally occupied, he knew the well was to be used to furnish water for family purposes and that the members of the family were going to the well for water. He leased the premises with reference to this use of the well by all the members of the family and withheld from them knowledge that the place to which they would resort more frequently than any other was dangerous and unsafe, and he was responsible for injuries to a member of the tenant's family who, in the exercise of ordinary care fell into the well by reason of its defective condition.

<sup>25</sup> House v. Metcalf, 27 Conn. 631 (exposed mill wheel frightening a horse); Tomle v. Hampton, 129 Ill. 379; Hedwig v. Jordan, 53 Ind. 21, 21 Am. Rep. 789; Campbell v. Portland Sugar Co., 62 Me. 555, 16 Am. Rep. 503 (wharf); Dalay v. Savage, 145 Mass. 33; Jackman v. Arlington Mills, 137 Mass. 277; Fisher v.

Thirkell, 27 Mich. 1, 4 Am. Rep. 422; Kern v. Myll, 80 Mich. 525, 8 R. A. 682. See also 94 Mich. 477; Irvine v. Wood, 51 N. Y. 224 (coal hole); Ahern v. Steele, 115 N. Y. 203, 12 Am. St. Rep. 778, 5 L. R. A. 449; Swords v. Edgar, 59 N. Y. 28, 17 Am. Rep. 295; Edwards v. Rissler, 26 Ohio Cir. Ct. R. 428, affirmed without opinion; Rissler v. Edwards, 70 N. E. Rep. 1129, 69 Ohio St. 572; Wunder v. McLean, 124 Pa. St. 334, 19 Am. St. Rep. 702; Joyce v. Martin, 15 R. I. 558 (wharf); Stenberg v. Wilcox, 96 Tenn. 163, 34 L. R. A. 615; Bowen v. Anderson, 1 Q. B. 164, 42 W. R. 263; Rich v. Basterfield, 4 C. B. 783, 16 L. J. C. P. 273; King v. Pedley, 1 Ad. & El. 822, 3 L. J. M. C. 119; Todd v. Blight, 30 L. J. C. P. 21, 9 C. B. (N. S.) 377, 3 L. T. 325, 9 W. R. 145.

<sup>26</sup> Tomle v. Hampton, 28 Ill. App. 142, affirmed, 21 N. E. 800, 129 Ill. 379; Pretley v. Bickmore L. R. & C. B. 401, 402.

premises. The question of the liability for a nuisance arises in most cases where the landlord or a tenant is sued by a third person for injuries. If the complete supervision and control of the premises have been surrendered to the tenant, and he maintains a nuisance or permits the premises to become dangerous and unsafe and they were not in that condition when he received them, he and not the landlord will be liable for damages caused by the nuisance. So far as his liability to a third person is concerned the landlord is bound only to see to it that no nuisance existed on the premises with his knowledge at the date of the letting and that they are not so defectively constructed that they are liable to create a nuisance subsequently as a result of their ordinary use. If he has done that he has done all that the law requires of him.<sup>27</sup> As between landlord and tenant the tenant will be solely liable to third persons for any nuisance maintained upon the premises during the term unless it is shown by the tenant that the nuisance existed at the date of the lease and the tenant continues to maintain it during the term. Then both landlord and tenant may be liable for injuries arising therefrom.<sup>28</sup> The landlord's liability for a nuisance existing upon the premises where they are leased is founded upon the rule that the creator of a nuisance is liable for injuries arising from its continuance and that he cannot release himself from his liability by parting with his ownership and possession of

<sup>27</sup> Kalis v. Shattuck, 69 Cal. 593, 11 Pac. Rep. 346; see City of New York v. United States Trust Co., 101 N. Y. Supp. 574.

<sup>28</sup> Edgar v. Walker, 106 Ga. 454, 32 S. E. Rep. 582; Samuelson v. Cleveland Iron Mining Co., 49 Mich. 164; Harris v. Cohen, 50 Mich. 324; Fehlhauser v. City of St. Louis, 178 Mo. 635, 77 S. W. Rep. 843; Eastlock v. Local Board of Health of West Deptford (N. J.), 52 Atl. Rep. 999; Leonard v. City of Hornelsville, 58 N. Y. Supp. 266, 41 App. Div. 106, 92 N. Y. St. Rep. 266. For as a general rule a landlord is not liable to third persons for any injury

they sustain occasioned by the wrongful acts of his tenant in keeping the rented premises in a dangerous or unhealthy condition. The only exceptions to this rule are: 1st. when the landlord has contracted with the tenants to repair; 2nd. when he let the premises in a ruinous condition; 3rd. when he has expressly licensed the tenant to do acts amounting to a nuisance. Edgar v. Walker, 106 Ga. 455, 457, 32 S. E. Rep. 582, in which it was held a landlord cannot be held liable for a nuisance maintained by the tenant on the premises unless he is shown to have licensed the nuisance.

the *locus in quo*.<sup>29</sup> The liability of a tenant who maintains or continues a nuisance which he finds in existence upon the premises is based upon the rule of law that everyone who continues a nuisance is as much answerable as he who first created it.<sup>30</sup>

**§ 481. The drainage of surface water.** An occupant of land, whether owner or tenant, may drain it and discharge the surface water, provided that, in doing so, he does not permit the water to overflow the land of others. The mere fact that he drains his land in such a way that some of the water overflows adjacent land is not evidence that he has not used reasonable care for in any case, the burden of proof to show that he is negligent is upon the party who claims to be injured. If it can be shown that the tenant has negligently allowed surface water to accumulate upon his own land and overflow the land of an adjacent owner,<sup>31</sup> or if he has negligently flooded his land so that large quantities of surface water run off his land and upon the land of another, he alone and not the landlord will be liable provided the landlord had no control or supervision of the matter.<sup>32</sup> A landlord who negligently constructs a system of draining, *i. e.*, a drain pipe connecting with a sewer, on his own land as a result of which the cellar of the leased premises is

<sup>29</sup> Jordan v. Helwig, 1 Wils. (Ind.) 447; Dorman v. Ames, 12 Minn. 451; Curtice v. Thompson, 19 N. H. 471; Eastman v. Amoskeag Mfg Co., 44 N. H. 143, 82 Am. Dec. 201; Waggoner v. Jermaine, 3 Denio, 306, 45 Am. Dec. 474; Anderson v. Dickle, 26 How. Pr. (N. Y.) 105; Commings v. Stevenson, 76 Tex. 742, 13 S. W. Rep. 556; Lohmiller v. Indian Ford Water Power Co., 51 Wis. 683, 8 N. W. Rep. 601.

<sup>30</sup> Grady v. Wolsner, 46 Ala. 381, 7 Am. Rep. 593; West v. Louisville, etc., Co., 8 Bush (Ky.) 404; Grogan v. Broadway Foundry Co., 87 Me. 321; Hubbard v. Russell, 24 Barb. (N. Y.) 404; Beckley v. Skroh, 19 Mo. App. 75; Plumer v. Harper, 3 N. H. 88, 14 Am. Dec. 333. In the case of an

accident on a wharf in Albert v. State, 66 Md. 325, 7 Atl. Rep. 697, the court said: "We think it may be held as well settled that where the owner of a wharf leases or rents it out, and, at the time of such renting, the wharf was in an unsafe condition for the use that the lessor knew it was to be put to, and the owner knew, or by the exercise of reasonable diligence could have known, of its condition, and one who is lawfully on the wharf and was injured in consequence of its condition that the owner is liable."

<sup>31</sup> Anheuser-Busch Brew. Ass'n v. Peterson, 41 Neb. 897, 60 N. W. Rep. 373.

<sup>32</sup> Edgar v. Walker, 106 Ga. 454, 32 S. E. Rep. 582.

flooded is liable to his tenant. For it is well settled, aside from any question of negligence, that a landowner has no right to collect water in an artificial channel and discharge it upon his neighbor's land. That such neighbor is his tenant is of course immaterial. Every private landowner may drain his land but he must accomplish his purpose with the most scrupulous regard for the rights of owners and occupants of adjoining property. Where a lessee charges negligence on the part of his lessor in draining an adjacent lot by reason of which large quantities of mud, slime and water are thrown upon the lessee's land he must prove the negligence to the satisfaction of the jury.<sup>33</sup>

**§ 482. Contagious disease.** A landlord who leases premises which he knows or has good reason to suppose are infected with a contagious disease is legally bound to inform the tenant of that fact and will be responsible in damages for the consequences of his failure to do so. This case constitutes an exception to the general rule that a landlord is not bound to reveal latent defects existing at the time of the execution of the lease. The exception is admitted because of the necessity of the case and on principles of humanity because the fact must be or ought to be within the knowledge of the landlord and usually cannot be ascertained by the tenant's most thorough and careful inspection and examination. If the landlord knows there has been a case of smallpox or other contagious sickness upon the premises, he may assume they are infected and dangerous and must disclose this fact to the tenant or refrain from leasing them, have them disinfected and wait until all danger of infection is past.<sup>34</sup> A landlord who, before he leases premises which were infected with scarlet fever employs a physician and an experienced nurse to thoroughly fumigate and disinfect them does all that can be required of him. He cannot thereafter be

<sup>33</sup> Smith v. Faxon, 156 Mass. 589, 31 N. E. Rep. 687, 689, holding also that a clause in the lease exempting the landlord from liability to his tenant for injury by "water, fire or otherwise" does not excuse his negligence in flooding the tenant's land, and distinguishing Fera v. Child, 115 Mass. 32.

<sup>34</sup> Minor v. Sharon, 112 Mass. 477, 488, 17 Am. Rep. 122; Bertie v. Flagg, 161 Mass. 504, 37 N. E. Rep. 572; Cesar v. Karutz, 60 N. Y. 229, 19 Am. Rep. 164; Span v. Ely, 8 Hun. 258; Snyder v. Gordon, 46 Hun (N. Y.) 538, 539; compare Edwards v. McLean, 122 N. Y. 302, 23 J. & S. 126.

held liable because a child of an incoming tenant contracts the disease though physicians on the trial may testify that there were better and more modern means of disinfection than those which were employed by the persons hired by the landlord.<sup>35</sup> The tenant has a right to rely upon the statement of the landlord that there is no contagious disease in the house in which he intends to lease an apartment. If the fact of the existence of contagion in the house is brought to the knowledge of the tenant he is not compelled to search out the physician who has charge of the case in order to verify this fact.<sup>36</sup> The landlord is liable for negligence if the evidence reasonably satisfies the jury that the infected character of the house was the cause of death. The connection between cause and effect need not be proved beyond a possibility of doubt. Whether vaccination is a precaution which a reasonable man would take and whether the tenant had his family vaccinated by a proper person and within a reasonable time are for the jury.<sup>37</sup>

**§ 483. Defective plumbing and water supply.** A landlord is not liable to his tenant for injuries to the health or life of the latter caused by the defective condition of the plumbing or drains in the premises when the lease was made unless he covenants to repair the plumbing or, with a knowledge of the defect in the plumbing or drainage, fraudulently misrepresents its condition to the tenant or fraudulently conceals it from him so that he relying thereon, is persuaded not to examine or to test it.<sup>38</sup> Nor is a landlord under any obligation to disclose a defect in the plumbing so long as he makes no misrepresentations in relation thereto.<sup>39</sup> The landlord who, when inquiries are

<sup>35</sup> Finney v. Steele (Ala. 1906), 41 So. Rep. 976. Proof that a house has been fumigated by the board of health and by them pronounced O. K. is sufficient to justify the landlord in supposing the house had been disinfected. Cutter v. Hamlen (Mass.) 18 N. E. Rep. 397, 1 L. R. A. 429.

<sup>36</sup> Sayder v. Gorden, 46 Hun (N. Y.) 538, 539.

<sup>37</sup> Minor v. Sharon, 112 Mass. 477, 488, 17 Am. Rep. 122.

<sup>38</sup> Daly v. Wise, 7 N. Y. Supp.

902, 15 Daly, 431, and see the case of Daly v. Wise, 132 N. Y. 306, 44 N. Y. St. Rep. 432, 30 N. E. Rep. 837, affirming 11 N. Y. Supp. 953; see also Towne v. Thompson, 68 N. H. 317, 44 Atl. Rep. 492; Blake v. Ranous, 25 Ill. App. 486; Strauss v. Hamersley, 13 N. Y. Supp. 816, 37 N. Y. St. Rep. 749.

<sup>39</sup> Bertie v. Flagg, 161 Mass. 504, 506, 37 N. E. Rep. 572; where it was alleged that the tenant had died of typhoid fever due to bad plumbing and the

made to him by the prospective tenant in regard to the sewerage or drainage of the premises, falsely represents its condition, is liable for any subsequent damages suffered by the tenant. If the tenant, when hiring premises for business purposes and as a place of residence for himself and family, asks the landlord if the premises are free from sewer gas and in a healthy condition and the landlord, knowing the purposes for which the premises are to be rented, and knowing that sewer gas was escaping into said premises, denies that there is any defect in the plumbing, he will be liable. The fact that the sewer gas is escaping being known to the landlord and not to the tenant, it is the duty of the landlord to disclose it to the tenant on being asked about it. It is a source of danger which is not apparent and cannot be discovered on inspection and the tenant has a right without making any inspection for himself to rely upon the landlord's statement as to whether there is any sewer gas escaping or not.<sup>40</sup> An incoming tenant on going into possession is not guilty of negligence because he fails to examine water pipes and other plumbing apparatus if it is necessary to take up the cellar floor and to dig into the ground. And where by reason of the freezing of water pipes or from some unknown cause the pipes running under the premises become clogged up as a result of which there is an overflow of water into the adjoining house and areaway, the failure of the tenant to inspect the plumbing apparatus does not render him liable for damages caused thereby.<sup>41</sup> Where, however, the tenant rented the premises with an open sewer or drain in the cellar and later there came from the drain an odorous gas and a nasty liquid discharge, the tenant cannot recover from the landlord damages where during the term he falls ill of typhoid fever. For the open sewer was or might have been known to the tenant and though he could not know gas would afterwards arise from it, this is equally true of the landlord.<sup>42</sup>

court distinguished the case from one where a house is infected with a contagious disease. As to sickness of the tenant attributable to sewer gas from an open sewer upon the demised premises see, *Rhoades v. Seidel*, 12 Detroit Leg. N. 17, 102 N. W. Rep. 1025.

<sup>40</sup> *Sunasack v. Mory*, 196 Ill. 519, 63 N. E. Rep. 1039.

<sup>41</sup> *McCord Rubber Co. v. St. Joseph Water Co.*, 181 Mo. 678, 81 S. W. Rep. 189, 192.

<sup>42</sup> *Rhoades v. Seidel*, 12 Det. Leg. N. 17, 102 N. W. Rep. 1025.

**§ 484. The joint liability for nuisance of the lessor and the lessee.** Where an owner of premises, which he knows to be in a dangerous state, lets them to another person for a purpose which he knows will result in bringing many third persons on the land and the lessee, though ignorant of the defective condition of the premises when he signs the lease, continues to use them after he learns of their condition, both lessor and lessee are liable jointly to a person who is injured by the defective condition of the premises.<sup>43</sup> Thus, the owner of a building intended for public exhibitions is liable to a member of the public who is injured while present at an exhibition therein given by a lessee who had rented it for one day only. By the acceptance of rent from his lessee with a knowledge of the purpose of its use, he will be presumed to have joined in the invitation to the public to enter the premises.<sup>44</sup> Both the tenant and the landlord may be jointly liable to a person injured by reason of his falling down a stairway admitting to the basement where the accident was due to a neglect to protect the stairway or to light

<sup>43</sup> *Gordon v. Peltzner*, 56 Mo. App. 599; *Joyce v. Martin*, 15 R. I. 558, 10 Atl. Rep. 820; *Brogan v. Hanan*, 55 App. Div. 92, 66 N. Y. Supp. 1066; *Holroyd v. Sheridan*, 53 App. Div. 14, 65 N. Y. Supp. 442, 448, appeal dismissed, 166 N. Y. 634; *Fox v. Buffalo Park*, 163 N. Y. 559, 57 N. E. Rep. 1109, affirming without opinion, 21 App. Div. 321, 47 N. Y. Supp. 788; compare *Waterhouse v. Joseph Schlitz Brewing Co.*, 12 S. D. 397, 48 L. R. A. 157, 81 N. W. Rep. 725.

<sup>44</sup> *Fox v. Buffalo Park*, 163 N. Y. 559, 57 N. E. Rep. 1109, affirming without opinion, 21 App. Div. 321, 47 N. Y. Supp. 788. Where a person injured has the right to sue both landlord and tenant for a joint tort he may sue the tenants alone even where the tort is joint in the strictest sense. *McAvoy v. Wright*, 137 Mass. 207,

210. Where the landlord and tenant are sued jointly and the judge directs a dismissal or a verdict in favor of the landlord the tenant cannot except. So if there be a verdict against both landlord and tenant and the plaintiff discontinues with leave of the court against either the verdict against the other will stand. The technical rule that a joint judgment is entire and if bad against one is bad against all has no application to any proceedings before judgment. But the plaintiff cannot take one judgment against the tenant and one against the landlord, *Monroe v. Carlisle* (Mass.) 57 N. E. Rep. 332. See also *Pickle v. Byers*, 16 Ind. 383; *Williams v. McFall*, 2 S. & R. (Pa.) 280, 281; *Heydon's Case*, 11 Coke, 5a, 5b; *Wilson v. Edwards*, 3 B & Cr. 734; *Stables v. Ashley*, 1 Bos. & P. 49.

it as required by a city ordinance.<sup>45</sup> And a release of either landlord or tenant from his liability will release the other inasmuch as they are joint feasors. Nor is the rule excluded by the fact that the injured party in a release to the landlord expressly exempts the tenant.<sup>46</sup>

**§ 485. The repairs of that portion of the premises which is in the exclusive control of the lessor.** It is a general rule that the landlord must keep in reasonable repair those portions of the demised premises which he retains in his possession and control. His obligation in this respect is not based on contract, but arises from the responsibility of an owner of real estate to persons who, by his invitation express or implied, are permitted to enter upon his property. In most cases, the portion of premises which are under the control of the landlord are the entrance and passageway by which the tenants and persons calling upon them obtain access to the portions of the building which are leased to the tenants. As to those portions of the premises which he has leased, he is exempt from liability to repair both as regards the tenants and as regards third persons for the reason that he has surrendered to his tenants the exclu-

<sup>45</sup> Brogan v. Hanan, 66 N. Y. Supp. 1066, 55 App. Div. 92, affirmed in Doepfner v. Michaelis (C. C. A.), 144 Fed. Rep. 1021.

<sup>46</sup> Brogan v. Hanan, 55 App. Div. 92, 95, 66 N. Y. Supp. 1066, and cases there cited. The landlord and tenant are liable as joint tort feasors for a nuisance where one created the nuisance and the other maintained it. Gordon v. Peltzer, 56 Mo. App. 599, 603; Clifford v. Atlantic Cotton Mills, 146 Mass. 47, 49. The absence of an agreement by the lessor to repair does not exempt him from liability. Waterhouse v. Schlitz Brewing Co., 16 S. D. 592, 597; also 12 S. D. 397, 48 L. R. A. 157, 81 N. W. Rep. 725. In House v. Metcalf, 27 Conn. 631, 640, the landlord being sued denied his liability upon the ground

that the premises were in the exclusive control of the tenant when the accident happened. The court said: "Everyone who aids, abets, instigates, authorizes or commands, as well as every one who actively participates in the commission of a tort is himself a principal tort feasor and liable as such. And the facts claimed by the defendant and found by the jury that at the time of the accident the wheel was in the same condition as when the lease was made, that it was used in the same manner contemplated and intended by the parties to the lease, and that for such use the defendant was to be paid compensation by way of rent, so far from exonerating him from, establishes his legal liability for the plaintiff's injury."

sive possession and control of the respective premises leased to them, and for the reason that without the permission of the tenant, he has no right to enter upon these premises to make repairs or for any other purpose during the term of the lease. If he shall lease all the premises owned by him to one tenant, he is not liable for injuries resulting to third persons during the term by reason of lack of repair even though he has covenanted with the tenant who occupies the whole premises to make repairs. And where the owner of a building leases it in separate apartments, the same rule applies as to his liability for lack of repair in the several apartments. Under such circumstances, however, the landlord has still the complete possession and full control of the other portions of the entire building which have not been demised or surrendered to the control of the tenants. These parts of the building which are subject to the necessary use which the tenants may make of them in connection with their enjoyment of the possession and use of their separate apartments, must be kept in repair by the landlord not because of any contract on his part, express or implied, but because of his supervision and control which he still retains over all parts of the premises not expressly demised to his tenants. His responsibility for their condition, and for injuries to third persons and even to the tenants, caused by their bad repair, is based solely upon his lack of reasonable care and skill in caring for his own property or in other words, his responsibility arises from negligence.<sup>47</sup> Thus, for illustration, a lessor who retains the complete control of a portion of the premises in which he erects and maintains dangerous machinery, will be responsible to persons injured thereby, where the injuries result from his failure to fence in the machinery or in some other manner to protect those who are rightfully in its vicin-

<sup>47</sup> Fairmount Lodge No. 590, A. F. & A. M., v. Tilton, 122 Ill. App. 636; Trower v. Wehner, 75 Ill. App. 655; Fisher v. Jansen, 30 Ill. App. 91, affirmed in 128 Ill. 549, 21 N. E. Rep. 598; Johns v. Eichelbarger, 109 Ill. App. 35, 36; Marwedel v. Cook, 154 Mass. 235, 236, 28 N. E. Rep. 140; Ward v.

Fagan, 28 Mo. App. 116; McGinley v. Alliance Trust Co., 168 Mo. 257, 66 S. W. Rep. 153; Markin v. Crumble, 35 N. Y. Supp. 1027, 14 Misc. Rep. 439; Dollard v. Roberts, 130 N. Y. 269, 29 N. E. Rep. 104; affirming 8 N. Y. Supp. 432; O'Connor v. Andrews, 81 Tex. 28, 16 S. W. Rep. 628.

ity.<sup>48</sup> Nor is the responsibility of the landlord confined to the halls and passageways of the building. It extends to such means of access as are customarily used with the building, though not within it if the landlord retains control and supervision of them. Accordingly, the owner of a hotel who has leased the whole building to one tenant, continues liable for injury occasioned by his negligence in permitting an outside platform to become unsafe and decayed, though the cause of its unsafeness and decay was the occupancy of the hotel by the tenant. The use of the platform by the tenant does not excuse the landlord's negligence if he has retained the exclusive supervision and control of the platform.<sup>49</sup>

**§ 486. The negligence of the landlord in making repairs.** The promise of the landlord to repair, made during the term, is not binding unless based upon a new consideration. If, however, having made such a promise the landlord sees fit to treat it as binding by undertaking to repair he must use ordinary care in making the repairs. For the tenant may maintain an action against the landlord for injuries occasioned by want of due care and skill in making repairs though the landlord was

<sup>48</sup> *Davis v. Pacific Power Co.*, 107 Cal. 563, 40 Pac. Rep. 950.

<sup>49</sup> *May v. Ennis*, 79 N. Y. Supp. 396, 78 App. Div. 552. As to the liability of the landlord for repairs in Georgia, see *Veal v. Hanlon*, 123 Ga. 642, 51 S. E. Rep. 579. The landlord owes a duty to maintain his premises in a proper condition so far as he has control over them to all who have the right to lawful entry upon them. This obligation extends to visitors, guests and customers of his tenant and all persons who enter and pass over a portion of the premises under the control of the landlord with the purpose of doing business or visiting the tenant have a right to demand that the landlord shall keep the premises reasonably safe as to them. *Wright v. Perry*, 188

Mass. 268, 74 N. E. Rep. 328; *Gordon v. Cummings*, 152 Mass. 513, 25 N. E. Rep. 978, 9 L. R. A. 640, 23 Am. St. Rep. 846; *Mawwedel v. Cook*, 154 Mass. 235, 28 Rep. N. E. 140; *Drennan v. Grady*, 167 Mass. 415, 45 N. E. Rep. 741. For while the landlord is not an insurer he is under a legal duty to keep the portion of the rented premises which are under his control in repair and he will be liable to a third person who receives an injury while lawfully upon the premises and who has exercised due care if the injury arises from his negligence in failing to repair defects of which he knows or of which he ought to have knowledge. *Ross v. Jackson*, 123 Ga. 607, 51 S. E. Rep. 578.

not bound to repair by the lease and the repairing was done at the tenant's request.<sup>50</sup> And the landlord may be liable to the tenant or to a third person for his negligence in making repairs though by the terms of the lease the tenant was bound to repair.<sup>51</sup> Thus, a landlord who undertakes to put a new roof on the house and in doing so has to remove the old one, will be responsible to the tenant who is damaged by exposure to the weather if he shall leave the house unroofed for an unreasonable period. Nor can the landlord under such circumstances escape liability by contracting with a third party to do the work. If the making of the repairs by the landlord would naturally be attended with risk and danger to the property of the tenant by reason of its exposure to the elements, it is the duty of the landlord to use the utmost care which he cannot shift to another. The probability that the tenant will be injured prevents the landlord from relieving himself of responsibility for the injury by showing that it was the result of the neglect of an independent contractor. This, perhaps, is an exception to the general rule that a person is not liable for the acts of an independent contractor. The exception is based upon the fact that there is a particular duty upon the landlord in view of the fact that injury may be anticipated and he cannot relieve himself from the duty by asking someone else to assume it.<sup>52</sup>

<sup>50</sup> *Gill v. Middleton*, 105 Mass. 477; *Wynne v. Haight*, 27 App. Div. 7, 50 N. Y. Supp. 187, 84 N. Y. St. Rep. 187; *Randolph v. Feist*, 23 Misc. Rep. 650, 52 N. Y. Supp. 109, 111, 86 N. Y. St. Rep. 109; *Wertheimer v. Saunders*, 95 Wis. 573, 578, 70 N. W. Rep. 824; *Robbins v. Atkins*, 168 Mass. 45, 46 N. E. Rep. 425.

<sup>51</sup> *Blumenthal v. Prescott*, 75 N. Y. Supp. 710; *O'Dwyer v. O'Brien*, 13 App. Div. 570, 77 N. Y. St. Rep. 805, 43 N. Y. Supp. 815; *Lynch v. Ortlieb*, 87 Tex. 590, 28 S. W. Rep. 1017.

<sup>52</sup> *Honnemeyer v. Fischer*, 27 Ohio, C. C. 8; *Nahm & Friedman v. Register Newspaper Co.*, 27 Ky. Law. Rep. 887, 87 S. W. Rep. 296.

In *Bower v. Peate*, 7 Q. B. 321, the court said: "A man who orders work to be executed, from which, in the natural course of things, injuries must consequently be expected to arise unless means are adapted by which they may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of the responsibility by employing some one else whether it be the contractor employed to do the work from which the danger arises or some independent person to do what is necessary to prevent the act he has ordered to be done from becoming wrongful. There is an obvious difference between giving

**§ 487. The landlord's liability in the case of apartment buildings and flats.** In the case of buildings which are let by the landlord to separate tenants occupying separate apartments, flats or lofts under separate leases, the landlord is responsible both to the tenant and to parties rightfully upon the premises for the condition of the entrances, passageways, stairways, halls, roofs, cornices, cellars and other portions of the premises which are exclusively under his supervision and control. He is bound to keep these parts of the premises in good repair and in a safe condition, not because he has contracted to do so but because of the duty which every owner or occupant of real property owes to the public to keep his premises in a safe condition for the use of all persons rightfully upon the same. He must use reasonable care and diligence to keep all such portions of the premises reasonably fit for the uses which he invites others to make of them, and he is responsible to any person for any injury received while using them lawfully and with due care. But the landlord under such circumstances is not an insurer of the premises and need only use reasonable care in their construction or in the selection of the material for that portion of the premises under his control and for its maintenance in a reasonably safe condition.<sup>54</sup>

work to an contractor to be executed from which, if properly done, no injuries consequently can arise and handing over to him work to be done from which consequently mischief will arise unless preventative measures are adopted. "While it may be just to hold the party authorizing the work in the former case exempt from liability from injury resulting from negligence which he had no reason to anticipate, there is on the other hand good ground for holding him liable for an injury caused by the act certain to be attended with injurious consequences if such consequences are not in fact prevented, no matter through whose fault the omission to take

the necessary measures may arise." A landlord cannot escape liability for negligence by transferring the work to an independent contractor. *Sulzbacher v. Dickie*, 51 How. Pr. (N. Y.) 500, which arose out of repairs to a roof and *Wertheimer v. Saunders*, 95 Wis. 573, 578, 70 N. W. Rep. 824, also a roof case, and *Promer v. Railroad Co.*, 90 Wis. 220, 223, 63 N. W. Rep. 90; *Cadden v. Barge Co.*, 88 Wis. 418, 419, 60 N. W. 800; *Hughes v. Railroad Co.*, 39 Ohio St. 476; *Woodman v. Railroad Co.*, 149 Mass. 335, 339, 21 N. E. Rep. 482; *Quarman v. Burnett*, 1 Q. B. Div. 321.

<sup>54</sup> *MERCHANTS' LOAN & TRUST CO. v. BOUCHER*, 115 Ill. App. 101; *BURKE v. HULLETT*, 216 Ill. 545, 75

**§ 488. Knowledge or notice of the defects by the landlord.** The question whether knowledge by the landlord of a defect is necessary to be proved by the plaintiff may arise in cases where the landlord is sued by a tenant for a breach of the covenant of the landlord to repair; or it may arise where the landlord is sued in tort by the tenant or by a third person for damages for personal injuries upon the liability of the landlord to maintain the premises in good condition. In the former case the tenant cannot recover what he has expended in repairs unless he has notified his landlord to repair and the latter has failed to do so.<sup>55</sup> Where the landlord is sued in tort a different situation exists. The rule is sometimes very broadly stated that the landlord is not liable in an action in tort based upon negligence in caring for his property unless he shall have had knowledge of the defect.<sup>56</sup> On the other hand it is expressly held that it is not necessary that the landlord shall have actual knowledge and that his ignorance of the existence of the defect is immaterial, but that whether he knows of the defect or not, he must exercise due care and skill and must be free from negligence on his part.<sup>57</sup> This apparent contradiction is readily reconciled by

N. E. Rep. 249; *Whitcomb v. Mason*, 102 Md. 275, 62 Atl. Rep. 749; *Gleason v. Boehm*, 58 N. J. Law, 475, 34 Atl. Rep. 886, 32 L. R. A. 645; *Siggins v. McGill*, 72 N. J. Law, 263, 62 Atl. Rep. 411; *Hargroves, Aronson & Co. v. Harttop*, 74 Law Jour. K. B. 233 (1905), 1 K. B. 472, 92 L. T. 414, 53 W. R. 262, 21 T. L. Rep. 226; *Gillon v. Reilly*, 50 N. J. Law, 26, 11 Atl. Rep. 481; *Looney v. McLean*, 129 Mass. 33, 37 Am. Rep. 295; *Vanderbeck v. Hendry*, 34 N. J. Law, 471, 472; *Brunker v. Cummins*, 133 Ind. 443, 32 N. E. Rep. 732; *McGinley v. Alliance Trust Co.*, 168 Mo. 257, 66 S. W. Rep. 153, 56 L. R. A. 334, 337; *Rayne v. Irvin*, 144 Ill. 482; *Bissel v. Lloyd*, 100 Ill. 214; *Trower v. Wahner*, 75 Ill. App. 655, 657; *Schwandt v. Metzger*, L. O. Co., 93 Ill. App. 365; *Leiferman v.*

*Osten*, 64 Ill. App. 578, affirmed in 167 Ill. 93; *Wilcox v. Zane*, 167 Mass. 302, 306.

<sup>55</sup> See *Sternberg v. Burke*, 84 N. Y. Supp. 862.

<sup>56</sup> *Thum v. Rhodes*, 12 Colo. App. 245, 55 Pac. Rep. 264; *Bowe v. Hunking*, 135 Mass. 330, 46 Am. Rep. 471; *Booth v. Merriam*, 155 Mass. 521, 30 N. E. Rep. 85; *Spellman v. Bannigan*, 36 Hun (N. Y.) 174; *Dollard v. Roberts*, 130 N. Y. 269, 294, 29 N. E. Rep. 104, 14 L. R. A. 238, affirming 55 Hun, 607, 8 N. Y. Supp. 432; *Hirtenstein v. Farrell*, 69 N. Y. Supp. 886.

<sup>57</sup> *Gill v. Middleton*, 105 Mass. 477; *Watkins v. Goodall*, 138 Mass. 533; *Readman v. Conway*, 126 Mass. 374; *Looney v. McLean*, 129 Mass. 33; *Lindsey v. Leighton*, 150 Mass. 285, 22 N. E. Rep. 901, 15 Am. St. Rep. 199; see *Holmes*

bearing in mind that the knowledge which is required is not necessarily the real and actual knowledge which one acquires by the operation of the senses. It is rather a technical sort of knowledge or more strictly speaking, it is notice which is implied by law from the circumstances of the case. For if a man owes a duty to another and the performance of that duty requires that he shall know some fact, he cannot deliberately neglect to employ the means at hand by which he would easily obtain the knowledge which it is his duty to have, and then escape the consequences of his failure to perform his duty by a plea of ignorance. If, with reasonable care which depends on all the circumstances of each case, the landlord might have known of the defect which was the cause of the injuries received, at the time the lease was made, he cannot prove his ignorance as a defense in an action based on his negligence, whether brought against him by his tenant or by some third person.<sup>58</sup> So, it has been held that the mere existence of a defect for a particular period may be constructive notice to the landlord of its existence.<sup>59</sup> Any fact or circumstance which is sufficient to constitute notice to the agent of the land is notice to the landlord himself.<sup>60</sup> To charge the landlord with negligence in caring for that portion of the premises over which he has control, it must be shown that he neglected to repair after having had

v. Wood, 88 Mich. 435, 50 N. W. Rep. 323, where the tenant vacated the premises because they were untenantable.

<sup>58</sup> Albert v. State, 66 Md. 337; State v. Boyce, 73 Md. 469, 471, 21 Atl. Rep. 322; Booth v. Merriam, 155 Mass. 521, 522, 30 N. E. Rep. 85; Leydecker v. Brintnall, 158 Mass. 292, 298, 33 N. E. Rep. 399; Cowen v. Sunderland, 145 Mass. 363, 14 N. E. Rep. 117; Maywood v. Logan, 78 Mich. 135, 43 N. E. Rep. 1052; Cesar v. Karutz, 60 N. Y. 229; Edwards v. Railroad Co., 98 N. Y. 249; Timlin v. Oil Co., 126 N. Y. 514, 27 N. E. Rep. 786; Ahern v. Steele, 115 N. Y. 203, 22 N. E. Rep. 193; Godley v. Hagederty, 26 Pa. St. 111; Young v.

Bransford, 12 Lea (Tenn.) 244; Hines v. Willcox, 12 Pickle (Tenn.) 148, 328, 33 S. W. Rep. 914, 916, 917, 54 Am. St. Rep. 823, 34 L. R. A. 824, affirming Stenberg v. Willcox, 12 Pickle (Tenn.) 163, 328, 33 S. W. Rep. 917, 34 L. R. A. 615; Shearman & Redfield, Neg. §§ 709-711; Taylor, Landlord & Tenant (7th Ed.) § 175. As to necessity of alleging notice in the complaint, see Stack v. Harris, 111 Ga. 149, 36 S. E. Rep. 615.

<sup>59</sup> Brennan v. Lachet, 5 N. Y. St. Rep. 882; Feinstein v. Jacobs, 15 Misc. Rep. 474, 37 N. Y. Supp. 345 (three months).

<sup>60</sup> Victory v. Foran, 56 N. Y. Super. Ct. 507, 4 N. Y. Supp. 392.

knowledge or notice of the dangerous condition of the premises, or if actual knowledge or notice is not shown, then that the landlord omitted to use reasonable means to ascertain the condition of the premises.<sup>61</sup> Notice or the knowledge of the defect by an agent of the landlord is the notice or knowledge of the defect by the landlord himself. So, the notice of the janitress or of the person who collects rents of the tenants in a tenement if he is aware of the dangerous condition of the entrance and of the stairway is notice to the landlord.<sup>62</sup> Thus, where it appears that there were defects in the stairway a week before the accident that the landlord frequently visited the premises every day and that the janitress testified that it was her duty to sweep the stairway and light the lamps and that she went up and down stairs every day, it may be presumed that the landlord had notice of the defective condition of the stairway.<sup>63</sup>

**§ 489. The liability of the landlord for the condition of the outside walls, roofs and cornices.** The tenant and not the landlord of a house which is under the full control and supervision of the tenant is liable to passersby and travelers upon the highway and street and to persons lawfully upon the premises for the repair of the roof and walls. He, and not the landlord, is liable for negligence in the care or for the lack of care of such portions of the premises. If the wall or roof was in a defective condition when he went into possession and the tenant fails to use due care, both he and the landlord may be responsible. But if, when the landlord surrendered possession to the tenant, the premises were not in a defective condition, the tenant who has assumed full control and supervision thereof will be solely responsible. Thus, where a traveler was injured by a piece of a skylight falling upon him which was blown from the roof of a building in the exclusive control of the tenant and there was no proof that the building was in a defective condition when it was leased, the negligence is wholly that of the

<sup>61</sup> Hutchinson v. Cummings, 156 Mass. 329, 31 N. E. Rep. 127, following Tuttle v. Manufacturing Co., 145 Mass. 169, 13 N. E. Rep. 465.

<sup>62</sup> Evers v. Weil, 17 N. Y. Supp. 29, 62 Hun (N. Y.) 622, affirmed

135 N. Y. 649, 32 N. E. Rep. 647, without opinion.

<sup>63</sup> Nadel v. Fichten, 34 App. Div. 188, 54 N. Y. Supp. 551, 88 St. Rep. 551; Dollard v. Roberts, 139 N. Y. 269, 273, 29 N. E. Rep. 104, 14 L. R. A. 248, affirming 8 N. Y. Supp. 432.

tenant.<sup>64</sup> Usually the landlord and not the tenant is liable for the defective condition of the outside walls. The fact that an outside wall fell because of the accidental pulling down of a wire which had been attached to it by a stranger does not excuse the landlord whose duty it was to keep the wall in good condition and repair it where it appears that he might have discovered by the use of ordinary care that the wire was attached to the wall.<sup>65</sup> The landlord who retains the supervision and control of the roof of premises which are let out to several tenants in separate apartments is responsible for its condition and liable if he shall prove negligent. As to the liability of the landlord of a tenement house as regards the condition of the roof, it has been held he is bound to exercise reasonable care and prudence to keep the roof of premises which are rented by him to tenants occupying separate apartments in a reasonably safe condition. This requirement of reasonable care and prudence would be satisfactorily met by proof that the landlord had caused the roof to be examined every month by a carpenter whom he hired, and the fact that the roof had been repaired a very short time before the accident.<sup>66</sup> Whether the landlord has been negligent in the care of the roof is a question of fact to be determined on all the circumstances in each particular case. It may be negligence for a landlord to remove an old roof for the purpose of replacing it by a new one. In the case of a house occupied by one tenant the landlord is not liable for injuries caused by the defective condition of the roof and gutter of the leased premises solely because he has kept the control and supervision thereof. There must be affirmative evidence that the roof and gutter were not in as good condition as when the house was let.<sup>67</sup> In other words, he must be shown to be guilty of negligence in not keeping the roof in as watertight a condition as when the premises were leased. Thus to illustrate, if a landlord permits a large amount of water to accumulate on a roof which he knows or ought to know is in a defective or unsafe condition,

<sup>64</sup> *Uggla v. Brokaw*, 102 N. Y. Supp. 857.

<sup>65</sup> *O'Conner v. Andrews* (Tex.), 10 S. W. Rep. 628 followed in *O'Conner v. Curtis* (Tex.), 18 S. W. Rep. 953.

<sup>66</sup> *Schwartz v. Monday*, 98 N. Y. Supp. 978.

<sup>67</sup> *Shute v. Bills*, 191 Mass. 433, 438, 78 N. E. Rep. 96, 98.

he will be liable in negligence for damages caused thereby to an employee of a tenant though the house was actually occupied by a tenant.<sup>68</sup>

**§ 490. The responsibility for injuries caused by ice and snow falling from the roof.** The actual occupant of a building is bound, as between himself and the public, to keep the roof clear of ice and snow and he is liable to persons injured by his failure to do so. A landlord who leases out his house in separate apartments reserving to himself the control of the roof will be liable for injuries caused by the fall of snow and ice from the roof upon a traveller if he failed to remove them within a reasonable time.<sup>69</sup> But where the landlord surrenders the possession and control of the roof as well as of other portions of the house to the tenant, the tenant and not the landlord is responsible. So, the tenant to whom the landlord has surrendered the exclusive control of the premises is bound to use reasonable care and diligence to remove the snow and ice which may accumulate upon the roof of the premises. If he shall fail to do so he will be liable in damages to any one who passing by the house on the street or highway is injured by the fall of snow or ice upon him. The landlord by his surrender of the control of the roof escapes all liability though he may have covenanted to repair and though he may have a right to enter upon the premises in order to make repairs. Under such circumstances there is no question of repairs. A tenant must show that he has used due care in

<sup>68</sup> Leithan v. Vaught, 115 La. 249, 39 So. Rep. 982. In the case of Pratt, Hurst & Co. v. Tailer, 186 N. Y. 417, 79 N. E. Rep. 328, which affirmed 100 N. Y. Supp. 16, the landlord was held liable for damages caused by a leaky roof on the following state of facts: The premises were an apartment house and the landlord retained exclusive control of the roof. He agreed to repair the roof but was not to be liable for damages caused by leaks in the roof unless he received written notice to repair it and neglected to do so. Having leased

the roof of the premises for a purpose for which it was by no means suitable a leak was caused and damage was done to the apartments of a tenant and the landlord was held liable for the damage, though he had no written notice where it was clearly apparent that he had actual knowledge of the leaky condition of the roof and knew how it was caused.

<sup>69</sup> Shipley v. Associates, 101 Mass. 251; Kirby v. Associates, 14 Gray (Mass.) 249; Simonton v. Loring, 68 Me. 164; Toole v. Beckett, 67 Me. 544.

clearing the roof of the accumulation of ice and snow and has taken proper precaution to avoid accident.<sup>70</sup> Thus, where a house was three stories high with a steep sloping roof slanting toward the sidewalk with no protection to prevent the snow from falling off the roof, it was held that the owner was not liable where the house was let to a tenant though the owner had covenanted to keep it in repair. The tenant would be liable unless he could show that he had used reasonable care to prevent the accident. And it was strongly intimated that a house in such a condition when the roof was covered with snow might be regarded as a public nuisance which the tenant and not the landlord would be under the necessity of abating.<sup>71</sup>

**§ 491. Falling sign under the control of the landlord.** A landlord who uses a signboard hanging from a part of the building which is wholly under his control, is put to a high degree of care in maintaining it in a safe condition. The fall of the sign, until explained, raises a presumption of negligence upon his part which he may rebut only by proving that he has used care and diligence to secure it properly and to maintain it, and the appliances by which it is attached to the building, in a safe and proper condition. He cannot excuse himself by showing that the sign and its appliances were in a defective condi-

<sup>70</sup> Lee v. McLaughlin, 86 Me. 410, 30 Atl. Rep. 65.

<sup>71</sup> Clifford v. Atlantic Cotton Mills, 146 Mass. 47, 15 N. E. Rep. 84. In this case the tenants had the full control and occupancy of the buildings. It included the exterior as well as the interior. It is immaterial whether such control and occupancy existed in consequence of a tenancy at will or by virtue of a written lease. The principle is the same. The building was not in itself a nuisance, and could become such only by reason of the action of the elements at certain times of the year. If there was any duty to keep the roof clear of ice and snow, it belonged to the tenants. If there was any neglect it was

their's and not the owner's. Nor is there anything in the case to show that the tenants might not, by the exercise of due care, have cleared the roof of snow, or, by proper precautions have prevented the accident. The tenants, for the time being were in the place of the owner. Nor is it necessary to determine how far the tenants might be warranted in placing suitable guards upon the roof to prevent snow and ice from falling into the street. It has been held that the tenant would have such right even where the right is reserved to the landlord to enter and make repairs. Lee v. McLaughlin, 86 Me. 410; 30 Atl. Rep. 65, 66.

tion when the tenant entered upon the possession of the premises, as the rule that he must keep in repair all portions of the premises over which he retains exclusive supervision and control will apply. Nor is it any defense for him to prove that the tenant knew how the sign was fastened unless it is also shown that he knew the fastening was insecure and failed to notify the landlord.<sup>72</sup>

**§ 492. The landlord's duty to light halls and stairways.** In the absence of statute a landlord is not required under all circumstances to light the halls, stairways and other passages of a tenement house.<sup>73</sup> The obligation of the landlord to keep the halls in a reasonably safe condition does not impose upon him the liability to keep them lighted at all times merely because the natural light is to some extent shut out. To hold that it becomes the duty of the landlord because he retains the control of the halls and stairways of his house to see that they are properly lighted at all times although they are otherwise in an apparently safe and proper condition is unreasonable and would impose too onerous a burden upon the owners of tenements. The landlord is under no obligation to keep the gas burning continually in the hallway. And if a visitor sees fit to "poke around" in an unlighted hallway which he may light up by the use of a few matches, he is himself negligent unless the defect in the hallway by which he is injured is such that he could not have discovered it by such means.<sup>74</sup> As between the landlord and the tenant the landlord is not liable for injuries resulting from his failure to place a light in a hallway which is otherwise safe, in the absence of a contract on his part to do so, or a statute making it obligatory upon him. He must keep the

<sup>72</sup> Payne v. Irvin, 144 Ill. 482, 33 N. E. Rep. 756, affirming 44 Ill. App. 105.

<sup>73</sup> Halpin v. Townsend, 107 N. Y. 683, 14 N. E. Rep. 611; Muller v. Minken, 5 Misc. Rep. 441; Hilsenbeck v. Guhring, 131 N. Y. 674, 676, 30 N. E. Rep. 580; Jucht v. Behrens, 7 N. Y. Supp. 195, affirmed in 26 N. Y. Supp. 690; Gorman v. White, 46 N. Y. Supp. 1, 19 App. Div. 324, 326; Brugher

v. Buchtenkirch, 51 N. Y. Supp. 465, 29 App. Div. 342.

<sup>74</sup> Muller v. Minken, 5 Misc. Rep. 44, 26 N. Y. Supp. 801, 802; Capen v. Hall, 21 R. I. 364, 43 Atl. Rep. 364; Dean v. Murphy, 169 Mass. 413, 48 N. E. Rep. 282 (evidence that hall was unlighted excluded); Holton v. Waller, 95 Iowa, 545, 64 N. W. Rep. 633 (unlighted passageway); Brancaleo v. Kors, 74 N. Y. Supp. 891.

hallway and stairs safe and fit for the use of the tenant and his visitors but it is not his duty to furnish a light. If to use it safely at night a light is necessary, it must be furnished by the tenant and not the landlord.<sup>75</sup> This is the rule where the halls and stairways are constructed in a reasonably safe and proper manner. If, however, there shall be anything in the construction of the halls or stairways so unusual as to render artificial light a necessity, and a proper precaution to ensure reasonable safety to those who use the halls and stairways, the landlord will be liable for injuries caused by his failure to supply it.<sup>76</sup> Hence, it is the duty of the landlord to light a hall or passageway where its floor is uneven or where it is arranged with steps, or where there is an opening in it, as an elevator shaft, so situated as to be cut off from the natural light. Thus, where the plaintiff went into the store of the defendant to purchase goods, and while passing along a hall which was darkened by piles of boxes, fell through an elevater opening, the court held that the place should have been lighted.<sup>77</sup> And in a case where the building was let out by the owner in separate offices, the halls being under the control of the landlord, and the stairways were winding and so constructed that natural light was cut off, it was held that the landlord owed the duty of providing a sufficient amount of light to render the stairway reasonably safe and that if he failed to do so he would be liable to one who was injured thereby.<sup>78</sup> In some states, statutes provide that landlords of certain classes of buildings shall provide lights for the common passageways under certain

<sup>75</sup> Gleason v. Boehm, 58 N. J. Law, 475, 34 Atl. Rep. 886, 887, 32 L. R. A. 645; Brancato v. Kors, 74 N. Y. Supp. 891. See also as to insufficiency of the light in a passageway and the contributory negligence of the tenant in failing properly to use the means of lighting it, supplied by the landlord, Holton v. Waller, 95 Iowa, 545, 64 N. W. Rep. 633. The plaintiff may show that it was the custom of the landlord to extinguish the light in the hallway at a certain hour in the morn-

ing; Brugher v. Buchtenkirch, 39 App. Div. 502, 57 N. Y. Supp. 314.

<sup>76</sup> Brugher v. Buchtenkirch, 51 N. Y. Supp. 464, affirmed in 39 App. Div. 502, 87 N. Y. Supp. 314; Sunderlin v. Hollister, 4 App. Div. 478, 38 N. Y. Supp. 682; Marwedel v. Cook, 154 Mass. 235, 28 N. E. Rep. 140 (where the construction of the stairs was such as to exclude the natural light).

<sup>77</sup> Sunderlin v. Hollister, 4 App. Div. 478, 38 N. Y. Supp. 682.

<sup>78</sup> Marwedel v. Cook, 154 Mass. 235, 28 N. E. Rep. 140.

circumstances. These statutes are usually construed strictly. If a statute provides that the owner of a building used as a factory shall light the halls when, in the opinion of the factory inspector, it shall be necessary, the owner is not responsible for injuries caused by his failure to provide lights unless it shall be shown that the factory inspector declared that they were necessary.<sup>79</sup> Where a statute enacts that a light shall be placed in the hallway of each floor of a tenement house from sunset until 10 o'clock p. m. and in each hallway from which no window opens outside from 8 a. m. until 10 p. m. unless otherwise sufficiently lighted, and evidence is conflicting as to whether an accident consisting of a fall down a stairway took place before or after sunset and as to the sufficiency of the light furnished, it is for the jury to determine whether the accident took place before or after sunset and if before sunset, then whether on all the circumstances the hall was sufficiently lighted and if not, whether the accident was caused by the insufficiency of the light. If the accident occurred after sunset and in the absence of a light and because of such absence and without contributory negligence on the part of the plaintiff, the jury should find for him though some light was admitted into the hall through a skylight since the opening of the skylight was not an opening to the outside from the hallway.<sup>80</sup> A failure to comply with a statutory provision that, a public hallway in a tenement house shall be lighted if it is not sufficiently lighted to permit a person to read in every part thereof without the aid of artificial light, is evidence of negligence in an action to recover for an injury caused by falling down an insufficiently lighted stairway.<sup>81</sup>

**§ 493. The landlord's liability for halls and stairways.** It is the duty of the owner of a house which is occupied by two or more tenants living in separate apartments under separate leases to keep the stairways, halls, passageways and entrances

<sup>79</sup> *Brancato v. Kors*, 74 N. Y. Supp. 891.

<sup>80</sup> *Lendle v. Robinson*, 53 App. Div. 140, 53 App. Div. 627, 65 N. Y. Supp. 894, 65 N. Y. Supp. 1138, 99 N. Y. St. Rep. 1138.

<sup>81</sup> *Ziegler v. Brennan*, 75 App. Div. 584, 78 N. Y. Supp. 342. See, also, *Gillick v. Jackson*, 40 Misc.

Rep. 627, 83 N. Y. Sup. 29, as to the effect of a statute directing the substitution of glass panels for the wooden panels in the doors at the end of public halls in tenement houses. Laws 1901, c. 33, and the effect of this statute upon Laws 1895, c. 567, § 9.

in and to said premises which are used in common by his tenants in good repair and in a safe condition. These means of exit and egress are usually under his exclusive control. The several tenants by their leases acquire no interest in them except so far as they have the right to use them as a means of access to their own apartments. For a lease of the apartment does not as an appurtenant transfer to the lessee any title to occupy the common hall or stairway except so far as it is absolutely essential for him to do so, in order to pass from the apartment to the street. He is not therefore by implication bound to make any repairs to any portion of the stairs, hall or entrance. In other words, the responsibility which is upon an owner of real property to keep his premises in a safe condition for all persons rightfully coming upon the same in the absence of an agreement to the contrary is cast upon the landlord so far as the portion of the building which is used by all the tenants in common is concerned. In other words, the obligation to repair depends upon the right to possession.<sup>82</sup> In Massachusetts it has been held that the

<sup>82</sup> Merchants' Loan & Trust Co., 115 Ill. App. 101; Burke v. Hulllett, 216 Ill. 545; La Plant v. La Zear, 31 Ind. App. 433, 68 N. E. Rep. 312; B. Shoninger Co. v. Mann, 219 Ill. 242, 76 N. E. Rep. 354; Sawyer v. McGillicuddy, 81 Me. 318, 323, 17 Atl. Rep. 124, 10 Am. St. Rep. 260, 3 L. R. A. 458; Whitcomb v. Mason (Md. 1905), 62 Atl. Rep. 749; Milford v. Holbrook, 9 Allen (Mass.) 17; Elliott v. Pray, 10 Allen (Mass.) 378; Shipley v. Fifty Associates, 101 Mass. 251 (repairs to roof); Readman v. Conway, 126 Mass. 374 (platform in front of premises); Looney v. McLean, 129 Mass. 33, 37 Am. St. Rep. 295, 3 L. R. A. 458 (staircase); Watkins v. Goodall, 138 Mass. 533 (pi-azza); Moynihan v. Allyn, 162 Mass. 270, 272, 38 N. E. Rep. 497 (platform); Martin v. Richards, 155 Mass. 381 (noxious odors);

Booth v. Merriam, 155 Mass. 521, 30 N. E. Rep. 85; Watkins v. Godall, 138 Mass. 533; Quinn v. Perham, 151 Mass. 162, 23 N. E. Rep. 735 (passageway); Bowe v. Hunking, 135 Mass. 380; Woods v. Cotton Co., 134 Mass. 357; Freeman v. Hunnewell, 163 Mass. 210, 39 N. E. Rep. 1012 (elevator); Hutchinson v. Cummings, 156 Mass. 329, 31 N. E. Rep. 127; Lindsey v. Leighton, 150 Mass. 285, 22 N. E. Rep. 901; Hart v. Cole, 156 Mass. 475; 31 N. E. Rep. 644 (elevator); Siggins v. McGill, 72 N. J. L. 263, 62 Atl. Rep. 749; Holmes v. Drew, 151 Mass. 578, 25 N. E. Rep. 22 (sidewalk); Leydecker v. Brintnall, 158 Mass. 292, 33 N. E. Rep. 399; Poor v. Sears, 154 Mass. 539, 28 N. E. Rep. 1046, 26 Am. St. Rep. 272; Gilloon v. Reilly, 50 N. J. Law, 26, 275, 11 Atl. Rep. 481; Vanderbeck v. Hendry, 34 N. J. L. 467,

landlord is not an insurer of the safety of his tenants while they use a common passageway giving them access to their separate apartments. He is compelled to use ordinary care. Apparently all that he need do is to use such care to keep the passageway in the condition in which it was when he leased the premises.<sup>83</sup> He is not bound, unless expressly so stated in the lease, to change its construction to render access more convenient or more secure.<sup>84</sup> It may be noted, however, that the Massachusetts rule is not followed elsewhere for in almost all the

471; *Brennan v. Lachat*, 5 N. Y. St. Rep. 882 (zinc covering unsafe); *O'Sullivan v. Norwood*, 8 N. Y. St. Rep. 388; *Feinstein v. Jacobs*, 15 Misc. Rep. 474, 37 N. Y. Supp. 345 (cellar stairs); *Totten v. Phipps*, 52 N. Y. 354 (open trap door in a hatchway in a hall); *Camp v. Wood*, 76 N. Y. 92; *Peil v. Reinhart*, 127 N. Y. 381, 384, 385, 27 N. E. Rep. 1077, 12 L. R. A. 843 (carpet on stairs full of holes); *Dollard v. Roberts*, 130 N. Y. 269, 29 N. E. Rep. 204, 14 L. R. A. 238, affirming 8 N. Y. Supp. 432 (falling of ceiling in a common hallway); *Darse v. Fischer*, 10 Ohio Dec. 163, 19 Wkly. Law Bul. 106; *Lewin v. Pauli*, 19 Pa. Super. Ct. 447; *Dawson v. Sloan*, 49 N. Y. Super. Ct. Rep. 304, affirmed 100 N. Y. 620; *Blake v. Fox*, 17 N. Y. Supp. 508; *Cohn v. May*, 210 Pa. St. 615, 60 Atl. Rep. 301; *Crane Elevator Co. v. Lippert*, 63 Fed. Rep. 942, 945, 11 C. C. A. 521, 24 U. S. App. 176 (obstruction in an unlighted hall); *Francis v. Cockrell*, L. R. 5 Q. B. 184, 501; *Miller v. Hancock*, 4 Rep. 478; (1893) 2 Q. B. 177; *Humphrey v. Wait*, 22 U. C. C. P. 580; *Purcell v. English*, 86 Ind. 34; *Cole v. McKey*, 66 Wis. 500, 509, 29 N. W. Rep. 279, 57 Am. Rep. 293. See *Coupe v. Platt*, 172 Mass. 458, 52 N. E.

Rep. 526, where the rule of the text was applied to outside steps and a platform. A landlord is liable to a tenant who is injured by stumbling over rubbish which was left in the hallway by the landlord in making repairs. *Wilber v. Follansbee*, 97 Wis. 577, 73 N. W. Rep. 559. In *Gilloon v. Reilly*, 50 N. J. Law, 26, 11 Atl. Rep. 481, the law is thus concisely stated: The owner of a building who divides it into several tenements, which he lets to various tenants, retaining to himself control of the halls and stairways for the common use of the occupants, and those having lawful occasion to be there, is bound to see that reasonable care and skill are exercised to render the halls and stairways reasonably fit for the uses which he invites others to make of them and he is responsible for any injury which others, lawfully using them with due care, sustain through his failure to discharge his duty; but he is not answerable for defects which do not render the halls and stairways reasonably unsafe for use, or which reasonable care and skill would not prevent.

<sup>83</sup> *Andrews v. Williamson*, 193 Mass. 92, 78 N. E. Rep. 737.

<sup>84</sup> *Andrews v. Williamson*, 193 Mass. 92, 78 N. E. Rep. 737.

states it has been held that the landlord's responsibility extends not only to keeping the passageway and halls in the condition they were when the lease was signed but in keeping them in good repair and safe condition.<sup>85</sup> It is not, however, every person who uses the halls and passageways to whom the landlord will be responsible for his neglect to keep them in a safe and proper condition. The landlord owes no duty to a trespasser, i. e., to one who comes upon the premises without having any right to be there. The landlord is bound to keep the halls and exits in repair so as to furnish a safe and convenient exit and entrance to the tenant and the members of the tenant's family and for his servants and employees. He is not, however, liable for negligence to mere licensees who are on the premises by permission only and without any allurement or invitation express or implied by the owner or occupant. The landlord will not be held responsible either as matter of law or by an implied contract to those who use the halls, stairways or entrances solely for their own convenience or pleasure and who are not either expressly or by implication invited or induced to do so by the purpose to which the premises are appropriated or occupied, or by such a use of the premises by others as will justify a reasonable presumption that they might properly and safely use them.<sup>86</sup> The duty of the landlord to a visitor to the tenant is therefore precisely the same both in character and degree as his duty to his tenant. For where houses are rented in separate apartments access to which can only be had by a common passage or hallway, the beneficial use of each separate apartment by the tenant not only necessitates the use of the common passageway by him but also necessitates the use of the passageway by all who visit him whether they be tradesmen or other persons who deliver goods to him, his customers if he shall carry on a business in his apartment, or other persons who call on him for business purposes as well as those who call upon him

<sup>85</sup> "The duty of the defendant was, to use due care to keep the platform and common passageways in a condition as good as they were at the time of hiring, and to inform the tenant of any hidden defect which could not be discovered by reasonable diligence

on his part, and of which the defendant ought for his proper protection to be informed." By Marton, J, in Moynihan v. Allyn, 162 Mass. 270, 272, 38 N. E. Rep. 497.

<sup>86</sup> Crane Elevator Co. v. Lippert, 63 Fed. Rep. 942, 945, 11 C. C. A. 521, 24 U. S. App. 176.

for purely social reasons. To all these various classes the landlord owes the same duty and degree of care as he owes to his tenant.<sup>87</sup> Under this rule the landlord is liable for obstructions placed in halls or passageways by himself or anyone in his employ. He must not wantonly and negligently obstruct the passageway. He is not responsible for injuries caused by obstructions placed there by others or the result of natural causes over which he has no control in the absence of negligence on his part.<sup>88</sup> The landlord of an apartment house is not liable for obstacles placed in hallways by a stranger unless he had knowledge of the same actual or constructive and neglected to remove them. Though the duty to keep the hallways clear may be upon the landlord, he will not be presumed to know at once that some stranger has placed an obstruction therein. He will be given a reasonable time to discover the presence of the obstruction and the burden is upon the person injured to show that the obstruction has existed such a period as to give the landlord notice.<sup>89</sup>

<sup>87</sup> Gleason v. Boehm, 58 N. J. Law, 475, 34 Atl. Rep. 886, 887, 32 L. R. A. 645; Hilsenbeck v. Guhring, 131 N. Y. 674, 30 N. E. Rep. 580; Phillips v. Library Co., 55 N. J. Law, 307, 27 Atl. Rep. 478; Miller v. Hancock [1893], 2 Q. B. 177; O'Sullivan v. Norwood, 14 Daly (N. Y.) 286.

<sup>88</sup> Watkins v. Goodall, 133 Mass. 533, 536; Boss v. Jarulowsky, 81 App. Div. 577. As to a lessor not being bound to remove snow or ice from a passageway or sidewalk see Woods v. Naumkeag Mfg. Co., 134 Mass. 357. As to a lessor's negligence in permitting ice to form in a common passageway, see Watkins v. Goodall, 133 Mass. 533, 537; Purcell v. English, 86 Ind. 34, 44 Am. Rep. 255.

<sup>89</sup> Boss v. Jarmulowsky, 81 App. Div. 577, 581, 81 N. Y. Supp. 400. "It was the duty of the defendant to use reasonable care to keep this stairway in repair and

suitable condition for the safe passage of his tenants over it on their way to and from their rooms; and for failure to do so he was chargeable with liability for injuries suffered by them without their fault while properly using it for such purpose \* \* \* This conclusion was warranted by the evidence that the condition of the carpet was such as to justify apprehension of danger of tripping in passing upon the stairway, and that at the time in question the plaintiff's foot was caught in a hole in the carpet; thus causing her fall and injury, and that the defendant was chargeable with negligence for permitting it to remain in such condition, and with its consequence to the plaintiff unless her negligence contributed to the injury which she sustained. It is urged that as she was cognizant of the situation and the hall

**§ 494. The landlord's liability for the condition of elevators used by tenants and others.** The liability of the landlord for negligence in running or maintaining a passenger or freight elevator which is wholly under his supervision and control, but which is used in common by the tenants of separate apartments and their servants and visitors, is precisely the same as his liability to maintain hallways and stairs exclusively under his control in a safe and proper condition.<sup>90</sup> A distinction may be made between those cases in which the tenant, being a passenger in an elevator, is injured solely by reason of the negligence of a servant of the landlord who is operating it, and those cases where the injury is caused solely by the condition of the elevator which the tenant is himself operating. In the former class of cases, the elevator and its appurtenances being in good condition, the liability of the landlord depends upon the negligence of his employee. Unquestionably the landlord has a right to make reasonable rules to regulate the times and mode in which the elevator, whether freight or passenger, may be used by the tenants.<sup>91</sup> He may permit its use during certain hours and forbid its use during all other hours if, at the same time, he

of the stairway was well lighted, her fall was necessarily attributable to the fault or negligence of the plaintiff. Her previous knowledge of the condition of the passageway on the stairs imposed upon her the duty to exercise a greater degree of care than otherwise may have been required in passing over them; but she was not required to desist from using the stairway by reason of the ripples in the carpet. And while the question may have been a close one of fact, it could not properly be held as a matter of law that the plaintiff was guilty of contributory negligence, and, therefore, the motion for nonsuit was properly denied." By Bradley, J., in *Peil v. Reinhart*, 127 N. Y. 381 on p. 385, 27 N. E. Rep. 1077, 12 L. R. A. 843, followed on

the point of the tenant's contributory negligence in using a stairway known by him to be in a defective condition, by *Kenney v. Rhinelander*, 28 App. Div. 246, 50 N. Y. Supp. 1088, which was affirmed in 163 N. Y. 576, 57 N. E. Rep. 1114; *Wessel v. Gerken*, 73 N. Y. S. 192, 193, 36 Misc. Rep. 221 (screws projecting above zinc strips on the stairway.)

<sup>90</sup> *Burner v. Higman*, 127 Iowa, 380, 103 N. W. Rep. 802; *Bogendorfer v. Jacob*, 89 N. Y. Supp. 1051; *Malloy v. New York Real Estate Ass'n*, 34 N. Y. Supp. 679, 681, 13 Misc. Rep. 496, 68 N. Y. St. Rep. 408, 2 Ann. Cases, 177; *Ellis v. Waldron*, 19 R. I. 369, 33 Atl. 869; *Gordon v. Cummings*, 152 Mass. 513, 25 N. E. Rep. 978.

<sup>91</sup> *Walsh v. Bourse*, 15 Super. Ct (Pa.) 219.

shall provide other means of exit and egress for his tenants. The landlord may also forbid the use of a freight elevator controlled by him for carrying passengers. In case he posts a warning that a freight elevator is dangerous and unsafe for passenger traffic, one who, with knowledge thereof, actual or constructive, uses such elevator as a means of passage to a lower floor cannot recover from the landlord for injuries he may sustain thereby.<sup>92</sup> A landlord of premises occupied by several tenants in separate apartments or lofts after warning them not to use the elevator erected as a means of access for them, in the absence of a person employed by him to operate it, is not liable for injuries to a tenant or to the servant of a tenant who undertakes to operate the elevator himself. This is the rule under any condition of affairs and applies even though the elevator was in a dangerously unsafe condition and was being used in the regular business of the tenant.<sup>93</sup> A landlord who negligently operates an elevator, is liable for injuries sustained by a lessee's servant whose duty calls upon him to ride upon the elevator when freight is going up or down. The servant is not a mere licensee to whom the landlord owes no duty. The measure of the landlord's duty is the same as it would ordinarily be in the case of a tenant. The landlord must see to it that the elevator is maintained in good condition and operated in a careful and skillful manner. As regards a servant of a lessee the landlord cannot escape liability for negligence by a provision in the lease that he was not to be responsible to the tenant for any damages occasioned by his failure to keep the premises in repair. The servant is not bound by this unless it appears he knew of it and contracted with his employer in reference to it.<sup>94</sup> An employee of the tenant who had frequently used a passenger elevator in the building where his employer carried on business, is not bound by an agreement in the lease that the landlord should carry tenants only and not employees. To bring knowledge of this home to him, the landlord may post explana-

<sup>92</sup> McCarthy v. Foster, 156 Mass. 511, 514, 31 N. E. Rep. 395. See Freeman v. Hunnewell, 163 Mass. 210, 39 N. E. Rep. 1012.

<sup>93</sup> Dashiell v. Washington Market Co., 10 App. D. C. 81.

<sup>94</sup> Shoninger v. Mann, 219 Ill. 242, 76 N. E. Rep. 354; Springer v. Ford, 88 Ill. App. 529. See also Bogendorfer v. Jacobs, 89 N. Y. Supp. 1051.

tory notices in the elevator or near it where they can be seen by the tenant's employees though actual oral notice to him would be sufficient. In the absence of any notice of the rule, he has the same right as an ordinary passenger.<sup>95</sup> Accidents often fatal in their result and almost always of a serious character very frequently occur by reason of a failure on the part of some person to use care in protecting with proper guards, chains or gates, the well-holes and openings in the premises used in connection with elevators or hoisting apparatus. If the premises are leased to several tenants, occupying separate lofts or apartments and having the right to use the elevator or hatchway in common, and the landlord has the exclusive supervision and control thereof, it is his duty to see to it that the openings on the several floors by which access to the elevator or hatchway may be had are properly protected so that both his tenants and their employees and their visitors and patrons may not be injured.<sup>96</sup> For a breach of this duty the landlord will be liable, though he and his tenant may have used the elevator jointly.<sup>97</sup> An instruction in an action against a landlord to recover damages by a servant of a tenant who fell down an elevator shaft that it is the duty of the landlord to use reasonable care to guard plaintiff against injury, and that it was the duty of the injured person to use reasonable care to guard himself against any danger that he knew of, or had reasonable grounds to expect; that what constituted reasonable care and diligence depended on the circumstances of the case, and that it was for the jury to say, considering the amount of light in the hallway, it being claimed that the plaintiff could not see whether the elevator was at the floor or not, how high a degree of care an ordinarily prudent person would exercise, was cor-

<sup>95</sup> Breuer v. Frank, 14 Ohio Dec. 666, reversed in Breuer v. Frank, 71 Ohio St. 540, 74 N. E. Rep. 1132.

<sup>96</sup> Rosenberg v. Schoolherr, 101 N. Y. Supp. 505.

<sup>97</sup> Burner v. Higman, 127 Iowa, 580, 103 N. Y. Rep. 802; Rhodius v. Johnson, 24 Ind. App. 401, 56 N. E. Rep. 942 (injury caused by passing through a door opening from a dark hallway in the les-

sor's premises which the person injured mistook for an entrance to room and which was partially open and unguarded with nothing to indicate that it was an entrance to an elevator shaft). To same effect Gordon v. Cummings, 152 Mass. 573, 25 N. E. Rep. 978; Shoninger Co. v. Mann, 121 Ill. App. 275, affirmed in 219 Ill. 242, 76 N. E. Rep. 354.

rect.<sup>98</sup> When the door to an elevator opening is locked and the key is kept by the agent of the landlord, and is in its proper place in his custody at the time of the accident, the landlord has done all the law requires him to do. He is not liable to one injured by the negligence of a tenant who, without his knowledge or consent, and with a key surreptitiously obtained by him, uses the elevator and in doing so negligently leaves the door open and unguarded.<sup>99</sup> An elevator which a tenant is entitled to use for the ordinary purpose for which it is intended cannot be used by him for another purpose except at his own risk of accident. Thus a tenant of a portion of a building who was entitled to use an elevator in common with the other tenants will be liable to the servants of owners of goods which are stored with him for hire where he places the goods stored with him in the elevator, from which they must be removed by their owners. The tenant is liable for negligence in failing to properly guard the elevator shaft by reason of which a person calling to remove the goods is injured.<sup>1</sup> The liability of the landlord for damages caused by an elevator must be based either upon proof that the

<sup>98</sup> Pascieszny v. Boydell Bros. White Lead & Color Co., 146 Mich. 223, 109 N. W. Rep. 417.

<sup>99</sup> Handyside v. Powers, 145 Mass. 123, 13 N. E. Rep. 462, 464. In New York by Laws 1892, c. 275, § 26, it is provided that the openings to all freight elevators or wellholes shall be provided with substantial guards or gates. Where an elevator was kept in repair by the owner, and used by the tenants jointly, and a visitor to one of the latter was injured by a chain which was the only safeguard to the elevator giving way while he was leaning upon it, and there is a conflict of evidence as to how the accident was caused it is for the jury to determine how the chain was broken and whether in any case the substantial guard required by the statute had been

provided. Weinberger v. Kratzenstein, 71 App. Div. 155, 75 N. Y. Supp. 537, reversing order and affirming judgment in 71 N. Y. Supp. 244, 35 Misc. Rep. 74. A landlord who during the term and at the request of his tenant puts an elevator in the premises for the use of the latter is not by implication entitled to be repaid the expense he has been put to because the lease shortly thereafter ended. Any additional rent the tenant has agreed to pay as compensation for the improvement may be recovered for the time it was used but no more. Willoughby v. Atkinson Furnishing Co., 93 Me. 185, 44 Atl. Rep. 612, 614.

<sup>1</sup> Burner v. Higman & Skinner Co., 127 Iowa, 580, 103 N. W. Rep. 802.

elevator was in an unsafe and dangerous condition when the building was leased or upon proof that the landlord reserved control over that portion of the premises in which the elevator was located. In the first case the landlord will be liable as the creator of a nuisance. If the landlord retains control of the elevator he may be liable for its negligent operation or he may be liable for the improper location of the well or shaft and for his failure to guard it by railings and gates where he knows that it is located in a portion of the premises which is frequented by many persons. When premises are leased out in separate offices or apartments to different tenants and they have the common use of the elevator it will be implied that the exclusive control of the elevator is reserved to the landlord whether he does or does not operate it. He is not bound to the highest degree of care particularly in the case of a freight elevator. He must employ ordinary care and diligence to light the portion of the building where the elevator is located and to protect it by guards so that the tenant, his family, servants, customers and guests and all persons on the premises may not suffer.<sup>2</sup>

<sup>2</sup> Burner v. Higman & Skinner Co., 127 Iowa, 580, 103 N. W. Rep. 802. "It seems to me that the question of the tenant's general liability is controlled by the decision of this court in Grifhahn v. Kreizer, 62 App. Div. 413, 70 N. Y. Supp. 937, affirmed by the Court of Appeals, 171 N. Y. 661, 64 N. E. Rep. 1121. It was held in that case that a lessee of a building who sublet the same to various tenants and who furnished and maintained a free elevator therein for their common use owed to the expressman who was using the elevator in the absence of one of the sublessees the duty of exercising reasonable care to see that it was safe. The owner of an elevator is not required to use the utmost care. He need not have the most modern

and improved form of elevator and the last mechanical devices of the most skillful builders. Such a rule would be unreasonable for there are elevators not only in large office buildings and hotels, but also in small buildings and even in private houses. Where there is little traffic the owner may be justified in permitting an employee or servant to run the elevator in connection with his other duties. Where the traffic is great, reasonable care would require an experienced man whose sole duty it should be to operate the elevator. For an elevator, though dangerous, is not more dangerous than the boiler which furnishes steam heat, or the wires which furnish the electric lights in the building. So an open hatchway is equally

**§ 495. Use of common hallways or stairs by a tenant is not contributory negligence.** The tenant's knowledge that a common entrance to or the stairways, halls or roof of a tenement is in an unsafe and dangerous condition imposes upon him the duty of exercising a greater degree of care in their use than he would be required to exercise if they were in good condition or if he had no knowledge of their real condition. But his knowledge that the stairways, halls, roofs or other things appurtenant to the premises which are used in common by the tenants and which remain wholly under the landlord's control, are dangerous and unsafe does not require him to refrain from using them in a careful manner nor render his careful use of them contributory negligence on his part.<sup>3</sup>

**§ 496. Snow and ice accumulating in passageways.** The landlord is not liable to his tenants for injuries caused by their slipping and falling upon ice and snow which have accumulated from natural causes upon the sidewalks, steps and passages on the premises though they are used in common by tenants hiring separate apartments. He owes no duty to his tenants to clear such places from ice and snow for to hold otherwise would compel him to keep a daily watch over the steps, sidewalks and halls to ascertain their condition. The tenants can usually remove the ice and snow with very little labor or at a minimum of expense to themselves and being able to do this they cannot hold the landlord liable when they are injured in using the passageways with full knowledge that they are unsafe on account of the ice and snow<sup>4</sup> which has fallen upon them. In the ab-

dangerous. But reasonable care under the circumstances is all that has been required and is all that should be required in the traffic of the elevator." Griffin v. Manice, 174 N. Y. 305, 59 N. E. Rep. 925.

<sup>3</sup> Karlson v. Healy, 38 App. Div. 486, 56 N. Y. Supp. 361, 90 St. Rep. 361 (roof of a tenement used by all the tenants for drying clothes); Kenny v. Rhinelander, 163 N. Y. 576, 57 N. E. Rep. 1114, affirming 28 App. Div. 246, 50 N. Y. S. Supp. 1088 (hole in stair car-

pet); Wessell v. Gerken, 36 Misc. Rep. 221, 73 N. Y. Supp. 192, 193, (screw projecting above zinc strip on stairway).

<sup>4</sup> Purcell v. English, 86 Ind. 34, 44 Am. Rep. 255, 261; Woods v. Naumkeag Mfg. Co., 134 Mass. 357, 45 Am. Rep. 344. See, also, Lumley v. Backus Mfg. Co., 73 Fed. Rep. 767, 20 C. C. A. 1, 38 U. S. App. 480; Shindelbeck v. Moon, 32 Ohio St. 264, 30 Am. Rep. 584 (where ice accumulated on steps not under control of the landlord). "It is not necessary

sence of a special agreement it is not the duty of the landlord to furnish running water for the tenant,<sup>4a</sup> and if he shall do so it is not his duty thereafter to keep the water pipes in repair unless he has agreed to do so. And where the landlord is not guilty of fraud or concealment he will not be held liable for the defective condition of the pipes by which water is supplied merely from the fact that he has agreed to supply the water. And having supplied apparatus which in part consisted of a tank in the cellar, the landlord is not compelled to watch it to prevent it from being covered with ice. Where the tenant is going to get water is injured by slipping on the ice which has accumulated by reason of the leaky condition of the pipes, the landlord is not responsible where it appears that he never agreed to keep the water apparatus in repair.<sup>5</sup>

**§ 497. The common use by the tenants of a yard of an apartment house.** The several tenants of a house which is let in separate apartments acquire as an incident to the use of their apartments, an easement in the use of the yard in a reasonable manner for all purposes to which it may appropriately be put. It may be used by them, in the absence of a restriction, for drying clothes on lines strung from the fences, or from poles erected by the landlord. It may also be used as a play-

for us in the present case to lay down any general rule upon the subject of a landlord's liability to a tenant occupying apartments in a tenement house occupied by other tenants. It is sufficient for us to ascertain and state a rule governing cases such as that made by the evidence before us. We are satisfied that the authorities warrant us in adjudging that, where a stairway connected with apartments hired in a tenement house is rendered unsafe by temporary causes such as accumulation of ice and snow, the landlord is not liable to the tenant who uses such a stairway with full knowledge of its dangerous condition, unless there is a contract on the part of the landlord to

keep the premises in repair and fit for safe use. Any other rule would entail upon landlords a grievous and unjust burden, cast upon them a duty which long settled rules have imposed upon tenants, and result in imperiling the interests of the owner out of possession, and relieve those in possession of his property from the care which the law imposes upon bailees and others occupying analogous positions." By the court in *Purcell v. English*, 86 Ind. 34, 44 Am. Rep. 255 on p. 261.

<sup>4a</sup> *Sheldon v. Hamilton*, 22 R. I. 233.

<sup>5</sup> *Whitehead v. Comstock & Co.*, 25 R. I. 423, 56 Atl. Rep. 446.

ground for the children of the tenants, and the tenants would also be entitled by implication to the easement of light and air which existed at the execution of the lease. The landlord of a house let in separate apartments having usually the exclusive control and supervision of the yard is bound to keep it, together with the poles used for drying clothes, and the fences and other appliances in a reasonably safe condition.<sup>6</sup> In the absence of statute or express contract, the landlord is not compelled to light the yard at night, but he must use ordinary care to see that the yard is maintained in such condition as will make it safe for his tenants and their families when they resort to it for a proper and appropriate purpose. If he has knowledge that the clothes-poles in the yard, or the fences, or similar appliances are in an unsafe condition, or if by exercise of reasonable care in inspecting the poles or fences he could have discovered the defect that makes them unsafe and which results in injury, he is negligent. But he has a right to assume when he has placed a new pole in the yard or has put up a new fence, that it will be safe for such a period as would ordinarily be the case; and he cannot be held liable because he has not discovered that a pole is rotten during the time that he might reasonably assume that it would be sound, unless the rottenness of the pole was apparent to ordinary examination. In other words, he is not responsible if he uses ordinary care in selecting material because a pole has a concealed defect which the utmost care on his part would not have revealed.<sup>7</sup>

**§ 498. Defective coal hole covers and cellar gratings.** As a matter of law a coal hole in a sidewalk in the absence of any statutory regulation of the subject requiring a license for its construction, is not a nuisance *per se* because it is constructed and maintained without the license of the municipality. The owner of the abutting property is not therefore presumptively liable for injuries received by falling into the opening if the coal hole and its appurtenances are not faulty in construction or out of repair.<sup>8</sup> Where a license from the municipality is re-

<sup>6</sup> Schmidt v. Cook, 12 Misc. Rep. 449, 33 N. Y. Supp. 624, affirming 10 Misc. Rep. 787, 30 N. Y. Supp. 1135; Garrett v. Somerville, 98 App. Div. 206, 90 N. Y. Supp. 705.

<sup>7</sup> Lenz v. Aldrich, 26 N. Y. Supp. 1022; see also 39 N. Y. Supp. 1022, 6 App. Div. 178.

<sup>8</sup> Frischberg v. Hurter, 173 Mass. 22, 52 N. E. Rep. 1086;

quired either by statute or ordinance, a very different rule is applicable.<sup>9</sup> An abutting owner or other person who, without the consent of the municipal authorities when such consent is required by law, excavates in or under a sidewalk is a trespasser. His excavation is a nuisance and he is liable in damages to anyone who, without contributory negligence, is injured thereby. Ordinarily the municipal corporation may authorize abutting owners to construct excavations in and under the sidewalks in front of their premises for use as vaults and coal holes and for other legitimate purposes. If the owner of the abutting property or other person obtains a license or authority from the municipality and he constructs his vault or other excavation in such a way that it is not inherently a nuisance, the licensee is liable only for injuries which may be caused by his failure to employ ordinary care in constructing the excavation. And after its construction it is his duty to use ordinary care in keeping the excavation in such condition as will render it as safe as the remainder of the sidewalk.<sup>10</sup> The owner of the land which

*Adams v. Fletcher*, 17 R. I. 137, 139, 20 Atl. Rep. 263.

<sup>9</sup> See *Weber v. Liebermann*, 94 N. Y. Supp. 460 (as to cellar grating). An excavation under a sidewalk in that portion of it most traveled by reason of which a pedestrian is compelled to turn out of the customary traveled path or to walk over a flimsy covering placed over the excavation is a nuisance *per se*. The lessor is liable for an injury caused by falling into the hole though the building is occupied by tenants while the excavation was there. *City of Memphis v. Miller*, 78 Mo. App. 67, 2 Mo. App. Rep. 235. In the following cases it was expressly held that a coal hole in a sidewalk which is not defective in its construction, or which is not allowed to become defective or out of repair so as to be dangerous and unsafe, is not a nuisance even though no license or au-

thority was obtained for the erection or maintenance of the coal hole: *Adams v. Fletcher*, 17 R. I. 137, 30 Atl. Rep. 263; *Joyce v. Martin*, 15 R. I. 558, 10 Atl. Rep. 620; *Owings v. Jones*, 9 Md. 108; *Rich v. Basterfield*, 4 C. B. 783, 801; *Fisher v. Thirkell*, 21 Mich. 20; *Weller v. McCormick* (N. J.) 19 Atl. Rep. 1102.

<sup>10</sup> *West Chicago Masonic Ass'n v. Cohn*, 61 N. E. Rep. 439, 192 Ill. 210, 94 Ill. App. 333; *McGuire v. Spencer*, 91 Ill. 303, 43 Am. Rep. 668; *Congreve v. Morgan*, 81 N. Y. 84, 72 Am. Dec. 495; *Trustees of Canandaigua v. Foster*, 156 N. Y. 354, 50 N. E. Rep. 671, 41 L. R. A. 554, 66 Am. St. Rep. 575; *Sturmwald v. Schrieber*, 74 N. Y. Supp. 995. Where the coal hole was excavated without municipal license it is a nuisance *per se* and a landlord is liable though he subsequently lets the property to a tenant who is in possession

abuts upon a street or a highway is bound, so long as he occupies or controls it, to maintain any structures which he may erect in or upon the highway for the purpose of benefiting his premises in sound and good condition. If he digs underneath and makes openings in the surface of the highway for the purpose of storing coal or other goods in his cellar he must protect them with sufficient covers or gratings which he must keep in good and proper condition so long as he controls them. If he leases the entire premises to a tenant who thereupon assumes their entire possession and control, this duty is transferred by the lease to the tenant.<sup>11</sup> In determining who is responsible in the case of leased premises for injury received by a traveller upon the public street by reason of a defective grating or other covering of a coal hole or other excavation in a sidewalk in front of the premises, it is in the first place necessary to determine whether by the lease the lessor has completely surrendered to the lessee the full control of the premises. The landlord, while he retains the exclusive control of the premises, owes a duty to the public to see that such appurtenances as gratings and covers over holes excavated in the sidewalk are kept in a safe and proper condition though when he surrenders possession of the entire premises to the lessee, this duty to the public devolves upon the latter.<sup>12</sup> So, where a portion of the building which included a vault under the sidewalk with a coal hole opening into it, was leased to a tenant who was to keep the same in good repair and the vault and coal hole had no connection with any

when a person is injured. *Irvin v. Fowler*, 5 Rob. (N. Y.) 482. Where a lease does not stipulate that a landlord shall repair, and the sidewalk is in good condition when the tenant enters, he and not the landlord is liable to third persons who are injured by a defect in a sidewalk during the term. *Lindstrom v. Pennsylvania Co.*, 212 Pa. St. 391, 61 Atl. Rep. 940. See as to tenant's responsibility for the repair of a coal hole in a sidewalk. *Clapp v. Donaldson* (Mass. 1907), 80 N. E. Rep. 486; *Pretty v. Bick-*

more

*L. R. 8 C. P. 401, 28 L. T. 704, 21 W. R. 733.*

<sup>11</sup> *City of Boston v. Gray*, 144 Mass. 531, 10 N. E. Rep. 509; *O'Brien v. Greenbaum*, 4 N. Y. Supp. 852.

<sup>12</sup> *Trustees of Village of Canandaigua v. Foster*, 156 N. Y. 354, 50 N. E. Rep. 971, 41 L. R. A. 555, 66 Am. St. Rep. 575, affirming 30 N. Y. Supp. 686, 81 Hun (N. Y.) 147; *Finnigan v. Biehl*, 30 Misc. Rep. 735, 63 N. Y. Supp. 147, reversing 61 N. Y. Supp. 1116.

other part of the building except that leased and controlled by the tenant who was entitled to have entire and sole control of the vault and basement, the tenant and not the landlord is liable for injuries received by a foot passenger on the sidewalk in consequence of a failure to properly cover the coal hole.<sup>13</sup> If, however, the coal hole was in a defective condition when the lease was executed and the tenant was not bound by the lease to put the premises in good and proper repair, the landlord may still be liable for injuries sustained during the term, upon the ground that he, and not the tenant, was guilty of creating a nuisance in spite of the fact that he has surrendered the control of the premises to the tenant.<sup>14</sup> A landlord who retains control of the sidewalk and the entrance to a building which is let to several tenants in separate apartments is liable for the defective condition of coal holes and covers and gratings appurtenant thereto, though these things are used by the tenants. Thus, he will be liable under such circumstances for the negligence of his janitor or other person in his employ in leaving a coal hole in the sidewalk open and unguarded, to take in coal, though the coal belonged to a tenant.<sup>15</sup> An owner of land bounding upon

<sup>13</sup> West Chicago Masonic Association v. Cohn, 192 Ill. 210, 61 N. E. Rep. 439, affirming 94 Ill. App. 333.

<sup>14</sup> Dalay v. Rice, 145 Mass. 38, 12 N. E. Rep. 841; Finnigan v. Biehl, 63 N. Y. Supp. 147, 30 Misc. Rep. 735, 97 St. Rep. 147, reversing 61 N. Y. Supp. 1116.

<sup>15</sup> Jennings v. Van Schaick, 108 N. Y. 530, 15 N. E. Rep. 424, 13 N. Y. St. Rep. 686, 20 Abb. N. Cases 324. See, also, Tomle v. Hampton, 28 Ill. App. 142, affirmed in 129 Ill. 397, 21 N. E. Rep. 800. Where a landlord leases a building and it is in good condition when leased, he is not liable for any injury resulting by reason of the negligence of the tenant in making use of the means furnished him by which use the premises may be

maintained in a safe condition for all persons using them. The following classes of cases come under this rule: 1st. Water and sewer fixtures, capable of safe use, where the tenant did not use them properly, by reason of which there was an overflow. 2nd. Cases where the premises abut on the highway and for the purpose of supplying the premises with coal, a hole is in the surface which when leased is supplied with appliances safe and proper to make it secure but the tenant either left the coal hole open or neglected to make use of the securing appliances. 3rd. Overhanging roofs, not supplied with means of preventing ice which may have accumulated from falling into street, and the tenant fails to remove the ice

a street or highway cannot escape liability for his negligence to keep in proper repair the approaches to his tenement which is let to several tenants occupying separate apartments, by proving he did not know where his boundary line was. He owes to his tenants and to their employees the duty not to expose any of them to a dangerous situation which he by reasonable care might have prevented. His duty is not shifted by showing his ignorance of the location of the true boundary which he might have readily ascertained on inquiry.<sup>16</sup>

**§ 499. The use of gas, natural or artificial, by the landlord.**  
A landlord who occupies a portion of the premises with his

from the roof, and persons are injured by snow or ice falling on them. 4th. Awnings constructed for protection from sun and weather, and the tenant permits them to be used as a standing place for a number of people by reason of which they are thrown down. See *Kalis v. Shattuck*, 69 Cal. 593, 11 Pac. Rep. 346; *White v. Montgomery*, 58 Ga. 204; *Allen v. Smith*, 76 Me. 335; *McCarthy v. Bank*, 74 Me. 415; *Leonard v. Storer*, 115 Mass. 86; *Handyside v. Powers*, 145 Mass. 123, 13 N. E. Rep. 462; *Johnson v. McLellan*, 69 Mich. 36, 36 N. W. Rep. 803; *Adams v. Fletcher*, 17 R. I. 137, 20 Atl. Rep. 263; *Texas Loan Agency v. Fleming*, 92 Tex. 458, 49 S. W. Rep. 1039, 1042. If, when the premises are leased, a coal hole in the sidewalk is out of repair, and the tenant permits it to remain so, both may be liable to one who is injured thereby. *Mancuso v. Kansas City*, 74 Mo. App. 138. See also *Kirchner v. Smith*, 207 Pa. St. 431, 56 Atl. Rep. 947. The tenant may recover for his injuries caused by a defective coal hole though the landlord did not have actual knowledge of the defect. *Udden v. O'Reilly*, 180 Mo. 650, 79 S. W. Rep. 691.

<sup>16</sup> *Leydecker v. Brintnall*, 158 Mass. 292, 33 N. E. Rep. 399; *Foley v. McCarthy*, 157 Mass. 474, 32 N. E. Rep. 669; *Lindsay v. Leighton*, 150 Mass. 285. The good faith of a lease appearing to have been executed and acknowledged prior to the accident by an owner who is sued for injuries caused by a defective sidewalk in front of his premises, the lessee never having taken possession, and the lessor claiming to be acting as the agent of the lessee, is a question for the jury. *Spaine v. Stiner*, 81 App. Div. 481, 64 N. Y. Supp. 655, affirmed in 168 N. Y. 666, 61 N. E. Rep. 1135. Even if such lease was actually made prior to the accident, it is no defense as against a third person, if it is proved that the sidewalk was unsafe at the time of its execution. *Spaine v. Stiner*, 64 N. Y. Supp. 655, 51 App. Div. 481, 61 N. E. Rep. 1135. For if a pedestrian is injured while the premises are in charge of a tenant the liability of the owner depends upon whether the sidewalk was or was not safe when the lease was made. *Mathews v. City of New York*, 78 App. Div. 422, 80 N. Y. Supp. 360.

tenant and who installs tubes in the portion which is under his control for the introduction of natural gas for his own benefit will be presumed to know the dangerous character of the element which he has put to use. He will be bound to take such precautions as a reasonable man would to protect his tenant. In maintaining and using the gas he must maintain the pipes and other appliances which are needed for its use in good condition. He is bound to use ordinary care to prevent the escape of gas from them and the consequent danger to the tenant. If he knows the pipes are defective and leaky he must use care to prevent them leaking to such an extent as will, if continued, result in an explosion. In all his dealings with the gas he will be presumed to know its dangerous character when it escapes. The doctrine of assumed risk from the escape of gas does not apply to the tenant. He is not required from time to time to make efforts to ascertain if the gas is in his rooms as he may assume his rooms are free from it. The action of the tenant in entering his rooms without making a test, and striking a match to light a candle, is not contributory negligence on his part as he had a right to assume that his landlord would keep his rooms free from gas. So, the landlord's liability does not depend upon whether he had or had not superior knowledge or means of knowledge. For if the landlord knew that gas was escaping, and that it would be likely to enter the rooms occupied by the tenant, it was his duty at once to find the leak and stop it, to cause the gas to be cut off, or take other proper precautions to prevent injury to his tenant.<sup>17</sup>

**§ 500. Negligence in the care of steam heating apparatus and chimneys.** The landlord of a flat or other building which is let out to tenants for use in separate apartments or offices and in which there is a steam heating plant which is under the exclusive control and supervision of the landlord is bound to use ordinary care and diligence to furnish heat when necessary and in such a quantity and to be delivered in such a manner as will not cause any injury to the persons or property of his tenants. The landlord of an office building let in separate offices is liable to a tenant for injuries caused by the escape of a large

<sup>17</sup> Indianapolis Abattoir Co. v. Temperly, 159 Ind. 651, 64 N. E. Rep. 906.

quantity of steam from a steam heating apparatus which was the result of his negligence in repairing or caring for the same.<sup>18</sup> So, too, a landlord who operates a steam heating apparatus so carelessly that the personal property of one tenant is damaged thereby by the smoke, dust, dirt, ashes and excessive heat which are emitted is liable therefor although there was a provision in the lease that the property of the lessee was to be kept upon the premises at his own risk as regards damage by fire or water,<sup>19</sup> or in any other way or manner. A landlord who has contracted to furnish heat may be liable for his negligence in failing to do so. Whether he has been negligent depends on circumstances. Evidence that a landlord agreed to furnish steam heat when necessary, that an infant son of the tenant became ill, that the boy's father told the janitor of this fact and that it was necessary that the room in which he was kept should be kept warm all night, requesting him to keep steam up and that the janitor refused to do so, alleging lack of authority, together with proof that no attempt was made to communicate with the landlord who lived a mile from the building, with conflicting evidence as to whether a patient in the condition of the boy should properly be kept in a warm room or a cool room is sufficient to justify a verdict that the landlord was not negligent or that, if he were negligent, his negligence was not the proximate cause of the boy's death.<sup>20</sup> As regards the liability of the landlord of an apartment house for damages resulting from a defective chimney or flue, the following rule has been laid down. The landlord is not liable for damages to and loss of personal property of his tenant which were caused by a fire originating in a defective flue in a chimney where he had not contracted to repair the premises and had no control over the chimney flue connecting with the apartments of the lessee. Under such circumstances in the case of apartments let to different tenants in an apartment house or flat, at least where there is nothing to prevent the occupant from going on the roof to inspect, and, if necessary, to clean out the flue communicating with his apartments, it is the duty of the tenant and not of

<sup>18</sup> Bryant v. Carr, 101 N. Y. 279, 38 Atl. Rep. 980, 39 L. R. A. Supp. 646. 246.

<sup>19</sup> Railton v. Taylor, 20 R. I. 1. <sup>20</sup> O'Donnell v. Rosenthal, 110 Ill. App. 225.

the landlord to see that the flue is kept clean and free from soot.<sup>21</sup>

**§ 501. The negligence of the landlord as regards falling ceilings.** The rule that there is no implied covenant on the part of the landlord to repair the demised premises applies to the condition of the ceiling. If it is not shown that the landlord knew or had reason to know that the ceiling of the tenant's apartments was dangerous or unsafe at the time of the letting and failed to disclose that fact, the tenant who is injured by the falling of the ceiling cannot recover damages from the landlord.<sup>22</sup> In the absence of proof to the contrary, the demise of the premises includes the ceiling where the premises are in the exclusive control of the tenant. The landlord is in no wise responsible for the condition of the ceiling unless he has actually agreed to keep it in repair in the lease.<sup>23</sup> The fact that he has repaired it on several occasions or promised to repair it does not make him liable. It is the manifest duty of the lessee to inspect such portion of the premises as are open to inspection at the date of the letting and usually the ceilings of dwelling houses and stores are open to inspection by even the most inexperienced observer. If at the date of the letting the tenant notices anything in the condition of the ceiling which indicates that it is in a defective condition, he should either refrain from leasing the premises or secure a warrantee that they are in good condition from the landlord. If, however, the landlord has, in letting the premises, guaranteed the safety and sufficiency of the same, he will be liable for damages resulting from defective ceilings, for the ceiling that will fall is in a ruinous condition and the warrantee of the condition of the premises implies that they are in a safe condition.<sup>24</sup> A tenant who, seeing that the ceiling of his apartments is likely to fall, continues to occupy them will ordinarily be guilty of contributory negligence. But where it is the duty of the landlord to repair the ceiling and he expressly promises to do so, upon which promise the tenant re-

<sup>21</sup> Cooper v. Lawson, 12 Det. Supp. 388; Schanda v. Sulzberger, Leg. N. 34, 103 N. W. Rep. 168. 40 N. Y. Supp. 116, 7 App. Div.

<sup>22</sup> Dyer v. Robinson, 110 Fed. 221; Boden v. Scholtz, 91 N. Y. Rep. 99; Kennedy v. Fay, 31 Misc. Supp. 437; Schiff v. Potzlitzer, 101 Rep. 776, 65 N. Y. Supp. 202, 99 N. Y. Supp. 249.

N. Y. St. Rep. 202. <sup>24</sup> Moore v. Steljes, 69 Fed. Rep.

<sup>23</sup> Golob v. Pasinky, 76 N. Y. 518.

mains, the tenant is no longer guilty of contributory negligence. If the landlord allows the dangerous condition of the plastering of the ceiling to continue, he will be liable for the tenant's injuries though the tenant with a knowledge that the ceiling is defective, remains in the premises.<sup>25</sup> The landlord must use reasonable care and diligence to maintain in good condition and safety the ceiling of the hall and passageways which are used in common by his tenants. Tenants are not guilty of contributory negligence because of necessity they use hallways the ceiling of which is in a dangerous condition, where the landlord knows the condition of the ceiling.<sup>26</sup>

**§ 502. Landlord's liability to a member of lodge which is his tenant.** A landlord who leases a portion of his premises to a lodge or other social or benevolent association is responsible in damages to a member of the association who is injured by reason of the negligence of the landlord where the member of the association is attending one of its meetings. A landlord who leases premises to such an association by implication invites all the members of the association to use the premises on meeting nights and other proper occasions when the association has the right to use them. The members of the lodge are not trespassers or intruders but go upon the premises on the implied invitation of the landlord. If, therefore, by reason of the landlord's negligence the ordinary approach to the lodge room or the room itself is left in an unsafe condition and a member of a lodge is injured thereby, the landlord is liable in damages.<sup>27</sup> But a member of a lodge who is injured may be estopped to recover by the acquiescence of the body of which he is a member in the course of conduct of the landlord. Thus, where the owner of premises let a hall for the installation of a lodge and a party, in entering the building to attend the ceremonies, fell and was injured owing to the insufficient lighting of the entrance, the

<sup>25</sup> Mason v. Howes, 122 Mich. 329, 81 N. W. Rep. 111.

<sup>26</sup> Dollard v. Roberts, 130 N. Y. 269, 41 N. Y. St. Rep. 253, 29 N. E. Rep. 104, affirming 8 N. Y. Supp. 432. In Mason v. Howes, 122 Mich. 329, 81 N. W. Rep. 111, the landlord after notice from his tenant attempted to repair plaster

and failed to take down defective plastering which was necessary to restore the premises to a safe condition. This subsequently having fallen the landlord was held liable for his negligence in doing the work.

<sup>27</sup> Brunker v. Cummins, 133 Ind. 443, 32 N. E. Rep. 732.

landlord was absolved from liability upon the grounds that the injured party was a licensee having only such rights against the owner as the lodge would have had. The lodge did not have any right to complain that a gas jet had not been placed in front of the building to light the entrance as it had rented the building without such gas jet being put in.<sup>28</sup>

**§ 503. The contributory negligence of the tenant.** A tenant who attempts to fix liability upon his landlord for the latter's negligence must plead and prove his own freedom from contributory negligence. The tenant has no action for damages against his landlord where he is guilty of contributory negligence even when his cause of action is based upon an express promise of the landlord to repair.<sup>29</sup> What in any case shall constitute contributory negligence or freedom from contributory negligence as between a landlord and his tenant depends upon the facts and circumstances of each case; that is to say, upon the character of the property and upon the use which the tenant is making of it at the time he is injured. The question of contributory negligence in actions between landlord and tenant usually arises in two classes of actions. The first class includes those cases where there is a leak in a roof over which the landlord has exclusive control and which he is therefore bound to repair, where the tenant's goods or furniture are damaged thereby. It is then for the jury to determine whether upon all the circumstances the tenant has taken proper precautions to protect his goods from damage by the water which has leaked through the roof. If the tenant knows that a roof is about to leak or is liable to leak, or if he has any knowledge from its condition that it is likely to leak in case of rain, it is his duty to take such precautions as a reasonably prudent man would take to protect his personal property upon the premises.<sup>30</sup> If a portion of the roof is removed by the landlord to make repairs, it is not contributory negligence *per se* on the part of the tenant for him to leave his goods exposed to the elements. He may safely do so if the weather is clear and the question whether his covering them with a tarpaulin is necessary is a question of fact for the

<sup>28</sup> *Jordan v. Sullivan*, 181 Mass. 348, 63 N. E. Rep. 909.

<sup>30</sup> *Margolius v. Muldberg*, 88 N. Y. Supp. 1048.

<sup>29</sup> *Martin v. Surman*, 116 Ill. App. 282.

jury. So whether a tenant negligently contributes to the damage which is caused to his goods by the elements during the making of repairs by the landlord by introducing other goods into the building which is being repaired is a question for the jury.<sup>31</sup> The other class of cases in which the question of the contributory negligence of the tenant must be inquired into comprises those cases where a tenant using a common hall, a passageway or stairs which give access to a building occupied in separate apartments by several tenants is injured by the failure of the landlord to keep this portion of the premises in repair. The tenant who is injured by a defect in the stairway of the demised premises caused by the negligence or lack of care of his landlord must show that he is himself free from contributory negligence. This, as in all cases, is a question of fact to be determined on all the circumstances by the jury.<sup>32</sup> The mere fact that a tenant who is injured by catching his foot in a hole in the carpet on the stairs while descending the stairs at night did not carry a light does not necessarily constitute contributory negligence though the tenant knew of the hole in the carpet.<sup>33</sup> Nor does it necessarily constitute contributory negligence that a tenant undertakes to descend a stairs in an intoxicated condition.<sup>34</sup> The mere fact that a tenant in common with other tenants of his landlord residing on the premises makes use of a common hallway or entrance or of a yard which is in a defective condition is not alone conclusive that he has been guilty of contributory negligence though he may know the defect.<sup>35</sup> And to sum up the matter in conclusion it may be said that the mere fact that a tenant continues to reside upon the premises after he has discovered their unsafe and defective con-

<sup>31</sup> See generally *Eberson v. Continental Inv. Co.*, 118 Mo. App. 67, 93 S. W. Rep. 298. St. Rep. 1088; *Lendle v. Robinson*, 65 N. Y. 894. See *Feinstein v. Jacobs*, 37 N. Y. Supp. 345, 15 Misc. Rep. 474.

<sup>32</sup> *Keating v. Mott*, 86 N. Y. Supp. 1021, 92 App. Div. 156; *Clarke v. Welsh*, 87 N. Y. Supp. 697; *Wesener v. Smith*, 85 N. Y. Supp. 837, 839, 89 App. Div. 211.

<sup>33</sup> *Lee v. Ingraham*, 94 N. Y. Supp. 284, 285; *Kenney v. Rhinelander*, 163 N. Y. 576, 57 N. E. Rep. 1114, affirming 28 App. Div. 246, 50 N. Y. Supp. 1088, 84 N. Y. St. Rep. 1088.

<sup>34</sup> *Kenney v. Rhinelander*, 163 N. Y. 576, 57 N. E. Rep. 1114, affirming 28 App. Div. 246, 50 N. Y. Supp. 1088, 84 N. Y. St. Rep. 1088.

<sup>35</sup> *Garrett v. Somerville*, 98 App. Div. 206, 90 N. Y. Supp. 705, 706 (injury caused by defect in drain in yard.)

dition does not constitute contributory negligence on his part. He must then use a greater degree of care to avoid danger though he is not required to keep constantly before his mind the exact locality of the defect, much less to keep away from that portion of the premises where it exists particularly when from the circumstances he has a right to use it in order to enjoy the complete possession of the premises.<sup>36</sup> Finally we may say that unquestionably the doctrine of assumed risk which is so prominent in the law of negligence as between master and servant, has no place as regards the relation of landlord and tenant. The doctrine of assumed risk is based wholly upon the peculiar contractual relation which exists when one person hires another to labor for him and is based upon the presumption that the servant, from his prior experience and present knowledge, knows the peculiar danger of the occupation upon which he has agreed to enter and that in fixing the rate of compensation he has taken it into account.<sup>37</sup>

**§ 504. Repairs by the landlord or his agent before or after the accident.** Proof of repairs by the landlord before the accident may be some evidence that he had possession and control of that portion of the premises which was repaired. Repairs after an accident by the landlord himself or by his agent at his direction may be competent but are never conclusive to show that the landlord had the supervision and control of the premises at the time of the accident. The fact that a general agent of a landlord who has a charge of the premises after the accident repairs or removes a defect or undertakes to make the premises safe is not conclusive either of the negligence of the landlord or of the fact that the landlord had the exclusive possession and control of the defective portion of the premises. But it is relevant to prove that the action of the agent was the outcome of the directions and instructions of the landlord.<sup>38</sup> The act of the landlord voluntarily undertaking at the request of a tenant to repair a defect in the premises is not conclusive of his liability to make repairs.<sup>39</sup>

<sup>36</sup> Keating v. Mott, 92 App. Div. 156, 68 N. Y. Supp. 1041, 1042.

<sup>37</sup> Shoninger Co. v. Mann, 219 Ill. 242, 76 N. E. Rep. 354.

<sup>38</sup> Kearines v. Cullen, 183 Mass. 298, 300, 67 N. E. Rep. 243.

<sup>39</sup> Phelan v. Fitzpatrick, 188 Mass. 237, 239, 74 N. E. Rep. 326; McKeon v. Cutter, 156 Mass. 296.

**§ 505. The liability of a tenant for negligence.** A tenant who has the exclusive possession, supervision and control of the whole premises or of any particular portion of the same, may make himself liable to a third person entering thereon with his permission or on his invitation, for his negligence in maintaining the part under his control in a safe condition. For it is a general rule that the occupant of lands who, by invitation express or implied, induces persons to come upon the premises, is under a duty to exercise ordinary care to render the premises so far as they are under his exclusive control reasonably safe for such purposes, or, at least to abstain from any act that will make the entry upon, or the use of the premises by another in any way dangerous or unsafe.<sup>40</sup> This liability is imposed upon the tenant as a duty which he owes to third persons aside from

<sup>40</sup> De Graffenreid v. Wallace (Ind. 1889), 53 S. W. Rep. 452; Deller v. Hofferberth, 127 Ind. 414, 26 N. E. Rep. 889; De Tarr v. Ferd. Heim Brewing Co. 62 Kan. 188, 61 Pac. Rep. 689; King v. Creekmore, 117 (Ky.) 172, 77 S. W. Rep. 689; Szathmary v. Adams, 166 Mass. 145, 44 N. E. Rep. 124; McCormick v. Anastaki, 66 N. J. Law 211, 49 Atl. Rep. 505; Eyre v. Jordan, 111 Mo. 424, 19 S. W. Rep. 1905; Phillips v. Library Co., 35 N. J. Law, 307 27 Atl. Rep. 478; Juress v. Railroad Company, 61 N. J. Law, 314, 40 Atl. Rep. 614; Devoe v. Railway Co., 63 N. J. Law, 276, 43 Atl. Rep. 899; Lichtig v. Poundt, 52 N. Y. Supp. 136, 23 Misc. Rep. 632; Dodd v. Rothschild, 31 Misc. Rep. 721, 65 N. Y. Supp. 214; Hirschfield v. Alsberg, 93 N. Y. Supp. 617; Fellows v. Gilhuber, 82 Wis. 639, 62 N. W. Rep. 307. So the owner who lets to another an entire tenement is not liable to one who is injured while passing through the common entrance but the tenant is liable as he has exclusive control of the whole premises. Texas & Pac. Ry. Co. v. Mangum, 68 Tex. 342, 4 S. W. Rep. 617; Marley v. Wheelright, 172 Mass. 530, 52 N. E. Rep. 346; see also Kalis v. Shattuck, 69 Cal. 593, 11 Pac. Rep. 346. And the tenant who is in full control and not the landlord is liable for injuries to the land adjoining caused by the erection by the tenant of a levee, without the license or consent of the landlord. Baker v. Allen, 66 Ark. 271, 50 S. W. Rep. 511. A subtenant is not liable for an injury to a third person unless he knew or has notice of the dangerous condition of the premises. Timlin v. Standard Oil Co., 126 N. Y. 514, 37 N. Y. St. Rep. 906, 27 N. E. Rep. 786. Evidence that the premises were in the exclusive control of a tenant is always relevant for the defendant where an owner is sued for injuries received on the premises. Louisville v. Terminal Co. (Tenn. 1903), 72 S. W. Rep. 945; Lindstrom v. Pennsylvania Co., 212 Pa. St. 391, 61 Atl. Rep. 940.

any agreement he may have made with the landlord to repair. If he has agreed with the landlord to keep the premises in repair, he and not the landlord will be liable because by the agreement to repair the landlord has a right to assume that he will keep the premises in a safe condition. The agreement to repair may be proved to show the extent to which the landlord has surrendered control of the premises to the tenant as well as to show the degree of care the tenant is bound to exercise.<sup>41</sup> The tenant may be held liable to third persons entering upon the premises by reason of his negligence in making repairs. Even though the premises are in a dangerous condition when leased and the tenant has not covenanted to repair it he must use ordinary care and diligence if he attempts to make repairs of a defect which existed when he hired the premises. Though the repairs may have been necessitated by the defective condition of the premises when he leased it if his attempt to make repairs is the proximate cause of injury, he and not the landlord will be liable.<sup>42</sup> A lessee who has been authorized by his lease to maintain an advertising sign on the premises over which sign he has full possession and control, must use reasonable care to maintain the sign board so it will not fall upon travellers and he, and not the landlord, is liable for injuries caused by the fall of the sign, resulting from his negligence.<sup>43</sup>

**§ 506. Liability of tenants to one another for negligence.** The different tenants who occupy the separate floors or apartments of a building under a common landlord owe certain positive duties to one another. Each is bound to all the others to employ reasonable care in the use and occupation of the prem-

<sup>41</sup> *Munroe v. Carlisle*, 176 Mass. 199, 57 N. E. Rep. 332; *Dodd v. Rothschild*, 31 Misc. Rep. 721, 65 N. Y. S. 214, 99 N. Y. St. Rep. 214; *Sterger v. Van Siclen*, 7 N. Y. Supp. 805, affirmed 132 N. Y. 499, 44 N. Y. St. Rep. 863, 30 N. E. Rep. 987.

<sup>42</sup> *Mayer v. Schrumpf*, 141 Mo. App. 54, 85 S. W. Rep. 915.

<sup>43</sup> *San Filippo v. American Bill Posting Co.*, 98 N. Y. Supp. 661. This case is to be distinguished from *Reynolds v. Van Buren*, 155

N. Y. 120, 49 N. E. Rep. 763, 42 L. R. A. 129. The tenant had in his possession use and control the sign board which was imminently dangerous if not kept securely fastened and which it had undertaken to maintain there. This carried with it a duty to see that the sign board did not fall from the roof upon neighbors or passers by. That duty was not contractual but sprang into life by reason of the contract.

ises which he occupies, so that the others may not be damaged in the use of the portions which they occupy. Each is bound to maintain his premises in a safe condition and for his failure to employ reasonable care and skill in this respect he will be liable for injuries sustained by the other tenants.<sup>44</sup> But in the absence of negligence or malfeasance on his part, a tenant of one part of a building which is let in separate portions is not liable to the tenant of another part for damages resulting from the destruction from the premises demised.<sup>45</sup> Where a building is let out in separate flats or apartments to tenants and each tenant has the exclusive control of his own apartment the tenant of an upper floor is liable to the tenant of a floor below for his negligence by reason of which water overflows and floods the lower floor.<sup>46</sup> The question of the reciprocal obligations of tenants under a common landlord to exercise reasonable care toward one another oftenest arises where, by reason of the carelessness or negligence of a tenant of an upper floor, water is permitted to overflow in a bathroom or toilet and by percolating through the floor of his apartment and the ceiling of a lower apartment, the personal property of a tenant occupying the lower floor is damaged. If it can be established that the overflow which has resulted in injury to the tenant upon the lower floor was due to the lack of reasonable care on the part of the tenant of the upper floor, he having the exclusive control of the

<sup>44</sup> Quigley v. H. W. Johns Mfg. Co., 26 App. Div. 434, 84 St. Rep. 98, 50 N. Y. Supp. 98.

<sup>45</sup> Eakin v. Brown, 1 E. D. Smith (N. Y.) 36.

<sup>46</sup> Simonton v. Loring, 68 Me. 164. The liability of tenants among themselves for damages arising from an overflow of water is discussed at considerable length in Simonton v. Loring, 68 Me. 164. The liability of the tenant of the upper floor is based upon the exclusive control which he has of the pipes and other water fixtures. The tenant is entitled to a reasonable use of the water. The degree of care which he must

use will be in proportion to the injury which may result if he is negligent. Hence, what is ordinary care depends upon the facts of each case. It must be equal to the occasion and is to be judged of according to the subject matter and the dangerous character of the material under one's charge. To sum up it may be said that where the occupation and right to use water fixtures are exclusive, the tenant is responsible for their proper use and proper care which are always to be determined on the circumstances of the case. Moore v. Goedell, 34 N. Y. 527, 530.

premises where the overflow originated, the tenant of such upper floor and not the landlord will be liable to the tenant of the lower floor.<sup>47</sup>

**§ 507. The liability for damages to a tenant on a lower floor by the overloading of an upper floor.** The landlord of a building let out to separate tenants in lofts each of whom has the exclusive supervision and control of the use he may make of his own part of the demised premises is not liable to the tenant of a lower floor for damages caused to him by the overloading of an upper floor by another tenant of the same landlord. So long as the upper tenant is in possession he may make any proper use of the premises but if he shall negligently overload the floors of his apartment so that damage shall result to the lower tenant he will be responsible.<sup>48</sup>

**§ 508. Injuries caused by overflow of water on upper floor.** The mere fact taken alone and without proof of other circumstances that water flows through from an upper floor upon the occupant of a lower floor does not alone create a cause of action either against the tenant of the upper floor or against the landlord.<sup>49</sup> There must be some facts from which, where there is no covenant to repair, negligence may be inferred by the jury on the part of the landlord or he will not be liable.<sup>50</sup> A landlord who occupies the upper part of the premises is not liable to the tenant who occupies the lower part for damages caused by water which, without negligence on the part of the landlord,

<sup>47</sup> Olin P. Ely Co. v. Rhoads, 61 N. Y. Supp. 817, 30 Misc. Rep. 111.

<sup>48</sup> Brunswick-Balke-Collender Co. v. Rees, 69 Wis. 442, 34 N. W. Rep. 732.

<sup>49</sup> Brick v. Favilla, 103 N. Y. Supp. 1117; Steinweg v. Biel, 16 Misc. Rep. 47, 37 N. Y. Supp. 678; Harris v. Boardman, 73 N. Y. Supp. 963 (water closet used by other tenants).

<sup>50</sup> Becker v. Bullowa, 36 Misc. Rep. 524, 73 N. Y. Supp. 944; McKeon v. Cutter, 156 Mass. 296, 31 N. E. Rep. 389; Rosenfield v. Newman, 59 Minn. 156, 60 N. W.

Rep. 1085; Haizlip v. Rosenberg, 63 Ark. 430, 39 S. W. Rep. 60; Leonard v. Gunther, 62 N. Y. Supp. 99; Kenny v. Barns, 67 Mich. 336, 34 N. W. Rep. 587; Kneeland v. Beare, 11 N. D. 233, 91 N. W. Rep. 56; Brick v. Favilla, 51 Misc. Rep. 550, 101 N. Y. Supp. 970. A lessor who stores wet hair in an upper loft so negligently that the dripping, from the hair injures the goods of a tenant on a lower floor is liable for his negligence to the tenant injured. Hysore v. Quigley, 9 Houst. (Del.) 348, 32 Atl. Rep. 960.

leaks from pipes located on the premises of the landlord and which ran into the premises occupied by the tenant.<sup>51</sup> The use of water for flushing water closets and similar purposes on the upper floors of a building is not of such a dangerous nature that negligence of a landlord will be presumed from the mere fact of injury occurring thereby.<sup>52</sup> Hence, it is a general rule well sustained by the cases, that, in the absence of a covenant to repair on his part, a landlord who rents the upper portion of a building containing water fixtures which are in good condition at the date of the execution of the lease to a tenant who has the exclusive possession and control of the same is not liable to a tenant of a lower floor for damages accruing during the lease caused by the defective fixtures.<sup>53</sup> If, however, the landlord has covenanted to keep the premises in repair, an injury caused by water flowing through the ceiling from an upper floor may render the landlord liable on his covenant though he is not proved to have been negligent.<sup>54</sup> If the injury caused by water flooding a lower floor is due to the negligence of the landlord, he will be liable. This would be the case where the floor from which the water flowed was vacant and was under the control and supervision of the landlord, or where he negligently failed to repair in a case where under the lease it was his legal obligation to repair.<sup>55</sup> In any case the fault must be that of the landlord. If it appear that the landlord has supplied proper appliances for the use of the water he is not responsible for an overflow caused by the act of some third person over whom he has no control.<sup>56</sup> Thus, where water overflows a sink and runs down

<sup>51</sup> Carstens v. Taylor, 40 L. J. 4, 129, L. R. 6 Ex. 217, 19 W. R. 723. Super. Ct. Rep. 406; Lansing v. Thompson, 8 App. Div. 54, 40 N. Y. Supp. 425.

<sup>52</sup> Bernhard v. Reeves, 6 Wash. 424, 426, 33 Pac. Rep. 873.

<sup>53</sup> Seidenberg v. Jones, 63 Ga. 612; Sheridan v. Farsee, 106 Mo. App. 495, 499, 81 S. W. Rep. 491; White v. Montgomery, 58 Ga. 204; Greene v. Hague, 10 Ill. App. 598; McCarthy v. York Co. Savings Bank, 74 Me. 315, 321, 324, 43 Am. Rep. 591; Kenny v. Barns, 67 Mich. 336, 34 N. W. Rep. 587.

<sup>54</sup> Simon v. Seward, 54 N. Y.

Super. Ct. Rep. 406; Lansing v. Thompson, 8 App. Div. 54, 40 N. Y. Supp. 425.

<sup>55</sup> Levy v. Korn, 61 N. Y. Supp. 1109.

<sup>56</sup> The landlord is not liable for damages caused by water overflowing a basin in a tenant's premises over which the landlord has no control. The fact that the bowl which was in the premises when the tenant entered had no holes in it sufficiently large to prevent an overflow does not render the landlord liable where the

into a lower floor on account of some unknown person having turned on a faucet which supplied water to an upper floor and thrown a rag into the sink which closed the outlet, the landlord is not liable for the damages ensuing to a tenant upon a lower floor although he had control of the sink and its appurtenances subject to their use by the tenant.<sup>57</sup> So, too, a landlord will not be liable for damages caused by an overflow of water from an upper into a lower floor which might have been avoided by cutting off the supply by means of a stop cock upon the outside of the premises demised where it was the duty of the tenant as well as the duty of the landlord to see that the water was cut off.<sup>58</sup> The landlord will be responsible for his negligence in connection with that portion of the plumbing system of the house which is exclusively in his control where the whole building is let out to tenants who occupy separate apartments.<sup>59</sup> But negligence on the part of the landlord will not be inferred as a matter of law from the fact that a water closet was out of repair and leaked at times.<sup>60</sup> Where at the time of the execu-

proximate cause of the overflow was the negligence of the tenant in leaving the faucet turned on at night. *McCarthy v. York Co. Savings Bank*, 74 Me. 315, 321, 43 Am. Rep. 591. In *Kenny v. Barns*, 67 Mich. 336, 34 N. W. Rep. 587, it appeared that by reason of the improper use by some unknown person a water closet on an upper floor became obstructed and overflowed to the injury of tenants on a lower floor. The water closet was exclusively in the control of the tenants and the landlord was under no obligation to keep it in repair. The court, relying on these two elements, *i. e.*, absence of control on the part of the landlord, and the absence of an agreement on his part to repair held that the landlord was not liable.

<sup>57</sup> *Rosenfield v. Newman*, 59 Minn. 156, 60 N. W. Rep. 1085.

<sup>58</sup> *Buckley v. Cunningham*, 104 Ala. 449, 15 So. Rep. 826.

<sup>59</sup> *Levine v. Baldwin*, 87 App. Div. 150, 84 N. Y. Supp. 92.

<sup>60</sup> *Bernhard v. Reeves*, 6 Wash. 424, 33 Pac. Rep. 873. In this case it was expressly held that a landlord need not put in the demised premises the best kind of water closet known at the time. His failure to do this is not negligence. It is sufficient if he puts in one which is ordinarily used and which is proper for the building when he puts it in. Thereafter he must give it such attention and care as are reasonable under all the circumstances of the case. It was said "we are not prepared to hold that the ordinary use for domestic purposes of water is of such a dangerous nature that if injury be done thereby it will be presumed to have been occasioned by the negligence of the user. The common and or-

tion of the lease the plumbing in the building is in a worn out and unfit condition, and this is well known to the lessor, and, on the other hand is not known at that time to the lessee, and cannot be discovered by him by any reasonable diligence on his part, the lessor may become liable to the lessee for the damages which the latter may suffer by reason of the condition of the plumbing. It is the duty of the lessor to disclose the defective condition of the premises to the lessee so that he may know of the latent defects and guard against them. The lessor may, however, covenant against liability for damages resulting to the tenant from defective plumbing and such a covenant will protect him against defects existing at the date of the execution of the lease as well as against those which may subsequently arise. Thus, under a stipulation that the lessor shall not be liable for any breakage in water pipes, water closets or plumbing nor make any repairs thereto, the tenant cannot recover from the landlord damages due to the bursting of water pipes, though it is proved they were worn out and in a defective condition to the knowledge of the landlord when the lease was signed.<sup>61</sup> A tenant who hires with notice that the water supply to the premises does not flow in one of the upper stories, has no claim for damages against the landlord unless he can show that the lack of water arose from defective plumbing. The mere lack of water in the upper story being within his knowledge when he hired the house does not give him a cause of action against his landlord, though if, in connection with this situation, the landlord represents the plumbing to be in perfect order he has a good cause of action if it is defective.<sup>62</sup> A landlord

ordinary usage of water is strictly lawful and not dangerous and the usual rule ought to be recognized that negligence in its use must be proved."

<sup>61</sup> Bullock-McCall-McDonnell Electric Co. v. Coleman, 136 Ala. 610, 33 So. Rep. 884.

<sup>62</sup> McDonald v. Flamme, 13 Abb. New Cases, N. Y. 356. The landlord owed the plaintiff no contractual duty with reference to condition of the sink. Neither was he the insurer of the absolute

safety of the premises as against the negligence of his tenants. He is liable, if at all, on the ground of his own negligence in the exercise of his general control and supervision over the closet and sink. He was bound to exercise reasonable care to prevent them from being a nuisance or doing injury to others. This duty rested upon the elementary maxim that a man must so use his own as not to injure others. But reasonable care did not re-

having the exclusive control of a roof is liable to a tenant whose personal property is destroyed by reason of his apartments being flooded where the flow is caused by one of the gutters designed to drain the water from the roof being stopped up, of which the landlord had due and timely notice but delayed attending to it.<sup>63</sup>

**§ 509. Tenant's liability for fire.** By the ancient common law, if a fire was kindled in a house by its occupant or by his servant, or by a member of his household or his guest, and it spread to his neighbor's house, he is liable, apparently irrespective of any question of negligence on his part.<sup>64</sup> But by a statute,<sup>65</sup> amended by a later statute,<sup>66</sup> it was in substance enacted that no suit or action could be maintained against any person in whose house or chamber any fire occurred accidentally after a certain date, it being also provided that nothing in these statutes should defeat or invalidate any contract between landlord and tenant. These statutes did not extend to the colonies though they have been generally re-enacted in the United States.<sup>67</sup> Though at first it seems to have been considered that the statutes exempted the occupant from fire resulting from his negligence, the contrary was held in an English case.<sup>68</sup> The present rule is that the protection of the statutes is confined to accidental fires which are those which can be traced to no particular or wilful cause and that an action will lie for negligence on the part of an occupant or his servants in guarding a fire intentionally kindled. The persons kindling the fire must employ

quire the landlord so to construct the sink as to reduce the possibilities of danger to an absolute minimum. The appliances furnished were ample if properly used; they were there when the plaintiff rented the lower story,—and we utterly fail to see why the landlord owed him any duty to reconstruct the sink on some other plan, at least in the absence of any proof from experience that the existing plan of construction rendered it unsafe.

<sup>63</sup> Hargroves, Aronson & Co v. Hartop, 74 L. J. K. B. 23, 1905, 1

K. B. 472, 92 L. T. 414, 53 W. R. 262.

<sup>64</sup> Lothrop v. Thayer, 138 Mass. 466, 469, 52 Am. Rep. 286, citing Beaulieu v. Finglam, Y. B. 2 Hen. IV fol. 18; Althorpe v. Wolfe, 22 N. Y. 355, 366; Filliter v. Phippard, 11 Q. B. 347; Tuberville v. Stamp, 12 Mod. 152.

<sup>65</sup> 6 Anne, c. 31, § 7.

<sup>66</sup> 14 Geo. III. c. 78, § 86.

<sup>67</sup> Lathrop v. Thayer, 138 Mass. 466, 469, 52 Am. Rep. 286.

<sup>68</sup> Filliter v. Phippard, 11 Q. B. 347.

ordinary care in guarding it so that it may not spread and injure others.<sup>69</sup> In most of the cases in the reports the fire was kindled on farm land for the purpose of clearing it. There may be some distinction in principle between such cases and those where the fire was kindled in a building in the proper place and manner for heating it. In the latter cases, questions as to the condition of the stoves, chimneys, furnaces and other heating apparatus may arise rendering it doubtful, if negligence is involved, upon whose shoulders to place the blame. Anciently a tenant at will was not liable to his landlord for his negligence in caring for a fire which was kindled to heat the premises and thus to render them habitable,<sup>70</sup> and there are *dicta* in modern times to the like effect.<sup>71</sup> In the case of tenancies for terms of years the tenant is held responsible to his landlord for his negligence in guarding fires kindled in the usual and proper places in a leased building for the purpose of heating it, in the absence of a stipulation to the contrary by the landlord in the lease.<sup>72</sup> But he cannot be held responsible to his landlord for accidental injuries to the premises by fire in the absence of a covenant to repair, where he is in no wise responsible for the kindling of the fire.<sup>73</sup>

<sup>69</sup> Barnard v. Poor, 21 Pick. (Mass.) 378; Tourtellot v. Rosebrook, 11 Met. (Mass.) 460; M'Kenzie v. M'Leod, 10 Bing. 385; Vaughan v. Menlove, 3 Bing. N. C. 468, 4 Scott, 244, cited and approved in Lathrop v. Thayer, 138 Mass. 466, 472, 52 Am. Rep. 286. Compare Mason v. Stiles, 21 Mo. 374, 378, 64 Am. Dec. 242.

<sup>70</sup> Countess of Shrewsbury's Case, 5 Rep. 13b; Countess of Salop v. Crompton, Cro. Eliz. 477. These cases proceeded on the theory that a tenant at will is not liable for permissive waste.

<sup>71</sup> Lathrop v. Thayer, 138 Mass. 466, 475.

<sup>72</sup> Co. Litt. 53b; Rook v. Warth, 1 Ves. Sr. 462.

<sup>73</sup> Wainscott v. Silvers, 13 Ind. 497, 500; Schwartz v. Saiter, 40

La. Ann. 264, 4 So. Rep. 77. On the issue of a tenant's negligence it is permissible to prove that no water was kept in and no watchman was stationed near the building to protect it from fire. Whether this was necessary to constitute proper care by the tenant is a question of fact, not of law. But evidence that the tenant was a "practical creamery man" and that the leased premises, a creamery, "was conducted in the same manner that an ordinarily prudent man in that business would conduct a creamery," is not admissible as the question of diligence in the matter of taking precautions against fire is solely a question of fact for the jury. Duer v. Allen, 96 Iowa, 36, 64 N. W. Rep. 682.

## CHAPTER XXII.

### THE DUTIES OF THE PARTIES TO REPAIR.

- § 510. The respective duties of the parties to the lease to make repairs.
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§ 510. **The respective duties of the parties to the lease to make repairs.** In this chapter it is proposed to consider the respective duties of the lessee and the lessor under the lease to each other to repair and to keep in repair the demised premises. By many writers and authorities, this question of repairs is confused and mingled with questions arising out of negligence causing injuries to third persons. The rules and principles regulating the duties of the parties to the lease to third persons in protecting and caring for the property and determining what care and skill they shall employ and what conduct of theirs shall constitute negligence so far as third parties are concerned, are elsewhere treated. The question of repairs is in the majority of cases a question of contractual liability and it is treated from that standpoint in this chapter. So, also, the question of repairs so far as a total lack of repair, constitutes an eviction of the tenant and excuses him from the payment of rent is elsewhere treated.<sup>1</sup> In this connection it may be noted that the common law rights and liabilities of the parties to the lease as respects the repairs of the demised premises have been considerably modified by statutes in some of the states of the Union. An attempt has been made to discuss these statutes, but the reader is advised to go to the original statute in all cases. In conclusion, it may be said that the ancient common law liability of the landlord to repair has been considerably modified in recent times by the almost universal rule in our large cities of leasing out buildings in separate flats or apartments, the landlord himself retaining the exclusive supervision and control of the entrance,

<sup>1</sup> See §—

corridors, hallways, roofs, court-yards, etc., of the same. Cases where the obligation to repair under such circumstances has been discussed are considered in this chapter, but more fully in the chapter on negligence<sup>2</sup> in which form the landlord's obligation to repair usually presents itself.

**§ 511. No implied covenant by the landlord to repair.** The obligation of a landlord to repair and to rebuild leased premises rests solely on express contract, and without an express covenant to that effect the landlord is neither bound to repair the premises himself nor to pay for repairs made by the tenant.<sup>3</sup>

<sup>3</sup> *Loupe v. Wood*, 56 Cal. 586; *Brett v. Berger*, 4 Cal. App. 12, 87 Pac. Rep. 222; *Kaufman v. Clark*, 7 D. C. 1; *Ocean S. S. Co. v. Savannah v. Hamilton*, 112 Ga. 901, 38 S. E. Rep. 204; *Aikin v. Perry*, 119 Ga. 260, 46 S. E. Rep. 93; *Quinn v. Crowe*, 88 Ill. App. 191; *Watson v. Moulton*, 100 Ill. App. 560; *Borggard v. Gale*, 107 Ill. App. 128; *Martin v. Surman*, 116 Ill. App. 262; *Canal Co. v. Bretts*, 25 Ind. 409, 411; *Kellenberger v. Foresman*, 13 Ind. 475; *Estep v. Estep*, 23 Ind. 114; *Biddle v. Reed*, 33 Ind. 529, 530; *Barman v. Spencer* (Ind.), 49 N. E. Rep. 9; *Roehrs v. Timmons* (Ind.), 63 N. E. Rep. 481; *Sun Ins. Co. v. Variable*, 20 Ky. Law. Rep. 556, 56 S. W. Rep. 486; *Hollingsworth v. Atkins*, 46 La. Ann. 515; *O'Leary v. Delaney*, 63 Me. 584; *Phelan v. Fitzpatrick* (Mass. 1905), 74 N. E. Rep. 326; *Pratt v. Grafton Electric Co.*, 182 Mass. 180, 65 N. E. Rep. 63; *Kearings v. Cullen*, 183 Mass. 298, 67 N. E. Rep. 243; *Bowe v. Hunking*, 135 Mass. 380; *Dutton v. Gerrish*, 9 Cush. (Mass.) 242; *Boyce v. Guggenheim*, 106 Mass. 201; *Beneteau v. Stubler*, 79 Minn. 259; *Johnson v. Millen*, 69 Mich. 36, 36 N. W. Rep. 803; *Vai v. Weld*, 17 Mo. 232, 233; *Harris*

v. Corliss, Chapman & Drake, 41 Minn. 106, 41 N. W. Rep. 940; *Rogan v. Dockery*, 23 Mo. App. 313, 315; *Hughes v. Vanstone*, 24 Mo. App. 637, 640; *Mayer v. Schrumpf* (Mo.) 25 S. W. Rep. 915; *Ward v. Fagin*, 101 Mo. 669, 14 S. W. Rep. 738; *Burns v. Fuchs*, 28 Mo. App. 279; *Little v. McAdaras*, 38 Mo. App. 187; *Landt v. Schneider*, 31 Mont. 15, 77 Pac. Rep. 307; *Clyne v. Holmes*, 61 N. J. Law, 358, 39 Atl. Rep. 767; *Lyon v. Buerman* (N. J. 1904), 57 J. Atl. Rep. 1009; *Jaffe v. Harteau*, 56 N. Y. 398, 15 Am. Rep. 438; *Johnson v. Oppenheim*, 55 N. Y. 280, 289; *Scott v. Simons*, 54 N. H. 430; *Castagnette v. Nichia*, 78 N. Y. Supp. 498; *Howard v. Doolittle*, 10 N. Y. Super. Ct. Rep. 464, 3 Duer, 364; *Sherwood v. Seaman*, 15 N. Y. Super. Ct. Rep. 127 130; *Mumford v. Brown*, 6 Cow. (N. Y.) 475; *Bloomer v. Merrill*, 1 Daly, 485, 29 How. Pr. (N. Y.) 259, 262; *Loupe v. Genin*, 31 N. Y. Super. St. Rep. 25, 32, 45 N. Y. 119; *Van Buskirk v. Gordon*, 10 N. Y. St. Rep. 351; *Curran v. Flammer*, 62 N. Y. Supp. 1061, 49 App. Div. 293; *Hays v. Moody*, 2 N. Y. Supp. 395; *Laird v. McGeorge*, 37 N. Y. Supp. 631, 16 Misc. Rep. 70; *Kennedy v. Fay*, 65 N. Y. Supp. 202, 31 Misc. Rep. 776; *Watson v.*

A covenant to repair the premises on the part of the lessor will never be implied from the mere fact of the lease, for the modern rule is not to create covenants by implication which the parties might have inserted in the lease in express language.<sup>4</sup> Thus, for example, there is no implied covenant that the lessor will pay for a new roof on the premises in place of one which was destroyed by natural wear and tear.<sup>5</sup> So, in the absence of misrepresentation by the landlord uttered when the lease was made, he is not bound to repair a leaky roof though he has the possession of the upper portion of the premises unless he has expressly agreed with his tenant in the lease that he will do so.<sup>6</sup> An agreement by the tenant to do all inside repairs does not by implication create any covenant on the part of the landlord to do all outside repairs.<sup>7</sup> The fact that a lessee has expressly covenanted to keep the demised premises in repair does not by implication create a covenant on the part of the lessor to maintain the outer walls or to maintain a supporting wall. Accordingly where from old age a wall which supported the demised premises was in danger of falling, and did in fact give way, so that the tenant's premises became uninhabitable, he cannot recover dam-

Almirall, 70 N. Y. Supp. 662; Read v. Bolger, 70 N. Y. Supp. 757; McAlpin v. Powell, 70 N. Y. 126; Edwards v. Railroad Co., 98 N. Y. 245; Linke v. Walcutt, 26 Ohio Cir. Ct. Rep. 10, affirmed 70 N. E. Rep. 1185, 69 Ohio Ct. 531; Burns v. Luckett (Ohio), 3 Weekly Law Bul. 517; Long v. Fitzsimmons, 1 W. & S. (Pa.) 530, 532; Hitner v. Ege, 23 Pa. 305; Moore v. Weber, 71 Pa. St. 429; Cornell v. Vanartsdal, 4 Pa. St. 364, 373; Russel v. Rush, 2 Pittsb. Rep. 134; Medary v. Cathers, 161 Pa. St. 87, 91, 24 Atl. Rep. 1012; Hess v. Weingartner, 12 Montg. Co. Law (Pa.) 105, 5 Phila. 451; Frey v. Zabinski, 10 Kulp (Pa.) 36; Kline v. Jacobs, 68 Pa. St. 87, 28 L. I. 85; Rawle v. Balfour, 16 W. N. C. (Pa.) 194; Laney's Estate, 14 Pa. C. C. 4; Weinstein v. Harris, 66 Tex. 546, 1 S. W. Rep. 626; Riggs v. Gray

(Tex. Civ. App.), 72 S. W. Rep. 101; Perez v. Rabaud, 76 Tex. 191, 13 S. W. Rep. 177; Arbenz v. Exley, 52 W. Va. 476, 44 S. E. Rep. 149; Kline v. McLain, 33 W. Va. 32, 37, 10 S. E. Rep. 11; Clifton v. Montague, 40 W. Va. 207, 21 S. E. Rep. 858, 52 Am. St. Rep. 872, 33 L. R. A. 449; Kuhn v. Heavenrich Co., 115 Wis. 147, 91 N. W. Rep. 994; Cole v. McKey, 66 Wis. 500, 57 Am. Rep. 293; Sutton v. Temple, 12 Mees. & W. 52; Harry v. Windsor, 12 Mees. & W. 68; Carstairs v. Taylor, L. R. 6 Ex. 217.

<sup>4</sup> Moyer v. Mitchell, 53 Md. 171, 176; Sheets v. Selden, 7 Wall. (U. S.) 423.

<sup>5</sup> Thomas v. Conrad, 24 Ky. Law Rep. 1630, 71 S. W. Rep. 903.

<sup>6</sup> Margolius v. Muldberg, 88 N. Y. Supp. 1048.

<sup>7</sup> Schiavone v. Callahan, 102 N. Y. Supp. 538.

ages from his landlord upon the theory that by the conduct of the landlord he will be prevented from occupying the premises.<sup>8</sup> A provision in a lease that the tenant will repair "after the house is put in order," does not bind the landlord to put the house in order.<sup>9</sup> Nor will an express agreement by the lessee to repair an upper floor leased by him for his particular business create an implied covenant on the part of the lessor to make repairs to the roof which are necessary to enable the lessee to carry on this business.<sup>10</sup> As a result of this rule, a tenant who at his own expense repairs the roof which he knew was leaky when he rented the whole house, cannot recover the amount which has been expended by him in repairs from his landlord in the absence of a contract by the landlord to repair.<sup>11</sup> Nor can the tenant recover from the landlord his expenses in rebuilding and repairing fences which were thrown or which fell down during the tenancy.<sup>12</sup> The same principle has been applied to the repairs of the sidewalk made by the tenant though made at the landlord's request,<sup>13</sup> where the landlord was under no obligation to repair.<sup>14</sup> So, a covenant on the part of the landlord to repair

<sup>8</sup> Colebeck or Colbeck v. Girdlers' Co., 45 L. J. Q. B. 225, 1 Q. B. D. 234, 34 L. T. 350, 24 W. R. 577.

<sup>9</sup> Frey v. Zabinski, 40 Kulp (Pa.) 36.

<sup>10</sup> Jones v. Millsaps, 71 Miss. 10, 14 So. Rep. 440, 23 L. R. A. 155. See also Weinstein v. Harrison, 60 Tex. 546; Ward v. Fagin, 101 Mo. 669; Kruger v. Ferrant, 29 Minn. 395; Purcell v. English, 96 Ind. 34; Cole v. McKey, 66 Wis. 500.

<sup>11</sup> Cantrell v. Fowler, 32 S. Car. 589, 10 S. E. Rep. 934, 935. In a case where a tenant expressly covenants to make all necessary repairs in and about the floor or that portion of the building occupied by him it may fairly be implied that the landlord agreed to repair the remainder of the building. Bissell v. Lloyd, 100 Ill. 214, 217.

<sup>12</sup> Jones v. Felker, 72 Ark. 405, 80 S. W. Rep. 1088.

<sup>13</sup> Powers v. Cope, 93 Ga. 248, 18 S. E. Rep. 815.

<sup>14</sup> But as between the landlord and the tenant, the latter is not liable for the cost of paving the sidewalk in front of the premises in accordance with an ordinance requiring the owner or occupant of premises to lay the pavement of the sidewalk. Hitner v. Ege, 23 Pa. St. 305. "The general rule is firmly established that no implied covenant for repairs can be raised against the lessor. The lessee cannot invoke an implied covenant of the landlord that the leased premises are fit and suitable for the lessee's business or use. The intruding tenant must use his own faculties, and judge for himself if the premises he desires to lease are in repair and are suitable for his use. If he wishes to protect

generally or to repair under any particular condition of affairs, will not be implied from an express covenant by the landlord to repair under other circumstances. Thus, a covenant by the landlord that he will repair the demised premises in case they should be partially destroyed by fire, but not rendered wholly untenantable, does not raise any implied covenant on his part to repair the premises when they have been wholly destroyed by fire and rendered wholly untenantable. It will be assumed in all cases of this character that the parties have made provision in the lease for every case in which the landlord should be held liable to repair.<sup>15</sup> Nor will a covenant to repair on the part of the landlord be raised by implication from the fact that he has voluntarily repaired.<sup>16</sup> So, too, the reservation to the lessor of a right of entry on the premises to repair does not authorize the implication of a covenant to repair by him. This right it is necessary the lessor should have in case of the occasion arising for extraordinary repairs, and reserving the right in words broad enough to cover ordinary repairs imposes on the lessor no obligation to make such ordinary repairs.<sup>17</sup> A land-

himself against the hazards of subsequently occurring accidents or defects requiring repairs, he must do so by proper covenants in his contract or lease. He takes his leased premises for better or worse as an ancient authority characterizes his taking. He takes the premises as he finds them, and he must return them as nearly as possible in like condition. This necessarily involves his making repairs on the property during the term of his lease; and all this must be true whether he leases one room or six; the whole or part of the house. If he rents the whole, the wisdom and the necessity of his protecting himself in his contract by stipulating for repairs by his landlord appear to be not less but greater than if he rents a part only. The rule extends to the whole premises and to every part of the premises. The duty of the tenant to examine

the premises and protect himself by proper stipulation in his contract of lease, if danger is suggested by his examination, is the same in case of the leasing of a whole or of a part only. He cannot fix liability upon his lessor by some supposed implied covenant to repair, when he had it in his power to create this covenant expressly in the written contract and failed to do so." By Woods, J., in *Jones v. Millsaps*, 71 Miss. 105 on p. 18.

<sup>15</sup> *Witty v. Matthews*, 52 N. Y. 512, 515.

<sup>16</sup> *Galvin v. Beals*, 187 Mass. 250, 72 N. E. Rep. 969; *Moore v. Weber*, 71 Pa. St. 429, 10 Am. Rep. 708; *Gulliver v. Fowler*, 64 Conn. 556, 30 Atl. Rep. 852, 854.

<sup>17</sup> *Gulliver v. Fowler*, 64 Conn. 556, 30 Atl. Rep. 852, 854, in which it was provided that the premises should be open at all times for in-

lord is not bound to repair the supply pipes for water so as to keep up the supply of running water in the absence of an agreement on his part to do so.<sup>18</sup>

• • • **§ 512. Statutory provisions imposing the duty to repair on the landlord.** In a few of the states of the union the duty to

spection and for necessary repairs. A covenant by the lessor to build a house upon the land demised, does not by implication raise a covenant on his part to repair the house which he has built if during the term it be destroyed by fire. *Cowell v. Lumley*, 39 Cal. 151, 2 Am. Rep. 430. A landlord is not bound to repair because he is trustee of the property under a will, providing that he should keep the house in repair, though the lease is made "subject to the provisions of the said will." *Wheeler v. Crawford*, 86 Pa. St. 327, 6 W. N. C. 172, affirming *Crawford v. Wheeler*, 4 W. N. C. 369. A tenant cannot take advantage of a provision in a will which directs his landlord who is a trustee under the will, to keep the demised premises in repair, though the lease states it is subject to the provisions of said will. This means that he is subject to its obligations but he must stand or fall by the lease and not upon the duties imposed on the trustee by the will for the benefit of those who take under it.

<sup>18</sup> *Coddington v. Dunham*, 3 J. & S. (N. Y.) 412, 45 How. Pr. (N. Y.) 40. A covenant on the part of the landlord to repair will not be implied because the lease contains a covenant of quiet enjoyment. *Bron v. Quilter*, 2 Amb. 620, or from the fact that the landlord has insured the premises against fire and has collected the insurance money. *Lofft v. Dennis*, 1 E.

& E. 474, or from the fact that the tenant's covenant to repair contains an express exception of repairs from ordinary wear and tear or from the destruction of the building from fire. *Weigall v. Waters*, 6 T. R. 488. In *Auworth v. Johnson*, 5 Car. & P. 239 the court said: "It appears that this was a very dilapidated house when the defendant (the tenant) took it and that they have had a very considerable quantity of work done upon it. The first question is, what are the things which an occupier of a house is bound to do? I am of the opinion that he is bound to keep the house wind and water tight and that is all he is bound to do. A tenant who covenants to repair, is to sustain and uphold the premises, but that is not the case with a tenant from year to year. A great part of what is claimed by the plaintiff consists of new materials where the old was worn out for that the defendants are clearly not liable." A tenant from year to year is bound not to commit waste and to make fair and tenantable repairs, such as putting in windows and doors that have been broken by him, so as to prevent waste and decay of the premises, but in the present case the plaintiff has claimed a sum for putting a new roof in an old worn out house. This I think the tenant is not bound to do." By Lord Kenyon, C. J., in *Ferguson's Case*, 2 Esp. 590.

maintain leased premises in repair during the term has been by express statutes cast upon the landlord and upon his failure to do so, the tenant may repair and deduct the cost of the repairs from the rent. These statutes, being clearly in derogation of the rules of the common law, must be strictly construed. A statute requiring a landlord to keep in repair "buildings intended for the occupation of human beings" refers exclusively to houses used by human beings for dwellings and not to premises used for storage and manufacturing purposes.<sup>19</sup> Nor does a statute merely requiring the landlord to repair generally cover patent defects in the premises which are known alike to both parties to the lease at the time the premises are offered for rent.<sup>20</sup> A statute which gives a tenant an option either to make necessary repairs at the expense of his landlord, or to vacate on the refusal of the landlord to repair, does not permit the tenant to continue in possession and offset damages from the failure of the landlord to repair against the rent.<sup>21</sup> A statute which authorizes a tenant to make repairs at the expense of his landlord and deduct the same from the rent does not permit the tenant to refuse to repair and at the same time to refuse to pay his rent on the ground of the landlord's failure to repair.<sup>22</sup> A statute which compels the lessor to put leased premises in a condition fit for occupation and to repair all subsequent dilapidations in case the demised premises are intended for the use

<sup>19</sup> Edmisen v. Aslesen, 4 Dak. 145, 147, 27 N. W. Rep. 182.

<sup>20</sup> Driver v. Maxwell, 56 Ga. 11. See also Lewis v. Chisolm, 68 Mo. 40. In California it is the duty of the landlord to repair upon notice. Cal. Civ. Code, § 1942. Van Every v. Ogg, 59 Cal. 563. In this state a lessor of a building intended to be occupied by human beings must by statute put such building in repair and keep it so. Under this statute he has the right to enter to make the necessary repairs required by the statute to make the premises tenable but not to enter in order to make extensive alterations. Dwyer

v. Carroll, 86 Cal. 298, 24 Pac. Rep. 1015, 1017.

<sup>21</sup> Maroney v. Hellings, 110 Cal. 219, 221, 42 Pac. Rep. 560.

<sup>22</sup> Pesant v. Heartt, 22 La. Ann. 292; Muller v. Kerler, 115 La. 783, 40 So. Rep. 46. The tenant must notify the landlord to repair. Lorenzen v. Wood, 1 McGloin (La.), 373. The putting in of a sewer to connect with the cellar of a dwelling house does not come within the words: "repairs, dilapidations, or deteriorations," which the landlord is required to remedy, under Rev. Codes, § 4080, 4081. Torreson v. Walla, 11 N. D. 481, 92 N. W. Rep. 834.

and occupation of human beings is applicable to property used for dwelling house purposes only and does not apply to that which is hired for business purposes. If there is nothing in the written lease to show for what purpose the demised premises are to be used by the lessee, parol evidence will be received to show the purpose and also incidentally to show the condition and character of the property.<sup>23</sup> So, the second story of a stone building which is leased and to be occupied for printing and publishing a newspaper is not intended "for the occupation of human beings" under a statute which requires the landlord of a building leased for such occupation to put and keep the same in repair.<sup>24</sup> The tenant may, either in express terms or by necessary implication arising from the construction of the lease, in its entirety waive the provision in the statute which is for his benefit. Thus, a tenant who stipulates in writing to make all needful repairs except the putting in of a new roof, new doors and a new floor, exempts the landlord from making any repairs under his statutory liability to repair other than those expressly excepted, and even from making those, unless they are needed and called for by the tenant.<sup>25</sup>

**§ 513. Repairs and alterations in compliance with municipal regulations.** It is sometimes expressly stipulated which of the two parties to a lease shall be bound to comply with the orders, notices and regulations relating to the repair, condition and use of the building, which are made by the authorities of the city or town in which the premises are located. Such a stipulation is valid and between the parties to the lease takes the place of any statutory obligation which may be upon either of the parties to observe such rules and regulations. Where it is not inserted in the lease, it will be presumed that the parties had the statutes or municipal ordinance in mind when they executed the lease. An owner of a building who is required by the building or other department of a city to make certain repairs or alterations in a building, may enter thereon and make the re-

<sup>23</sup> Landt v. Schneider, 31 Mont. 15, 77 Pac. Rep. 307, 308.

<sup>24</sup> Tucker v. Bennett (Okl. 1905) 81 Pac. Rep. 423.

<sup>25</sup> Powers v. Cope, 93 Ga. 248, 18

S. E. Rep. 815. In Georgia by statute the landlord is bound to repair. Veal v. Hanlon, 123 Ga. 642, 51 S. E. Rep. 579.

pairs and he will not be liable to a tenant in possession for interrupting the business of the latter so far as is necessary to make the repairs.<sup>26</sup> A contractor who makes repairs required under municipal order by the direction of the landlord will not be liable for any loss of business necessarily resulting to the tenant thereby.<sup>27</sup> A covenant by the tenant to make all repairs necessarily binds him to make repairs which are ordered by the building department. If the landlord is compelled to make such repairs, he may charge the amount spent by him against the tenant who has agreed to make all repairs, even though the tenant has surrendered the premises.<sup>28</sup> Thus, the failure of a landlord to protect the walls of the demised premises from injury which is caused by an excavation made upon an adjacent lot after the landlord has been notified by the city to protect the walls of his building from falling, does not render him liable for damages to his tenant in case the latter has covenanted to repair.<sup>29</sup> On the other hand, a lessee who has covenanted to keep and restore the building in the condition it was when received by him is not thereby bound to pay for the removal and rebuilding of a part of the premises made pursuant to an order of a building inspector particularly where the alterations ordered by the municipal authorities were necessary to be made before the lessee could enter upon the premises.<sup>31</sup> So, a tenant who has covenanted to do all repairs both inside and outside and to comply with all rules of the building, health or fire department, or

<sup>26</sup> White v. Thurber, 55 Hun, 447.

<sup>27</sup> Campbell v. Porter, 46 App. Div. 628, 61 N. Y. Supp. 712.

<sup>28</sup> Markham v. David Stevenson Brewing Co., 93 N. Y. Supp. 684. Compare Taylor v. Finnegan, 189 Mass. 568, 76 N. E. Rep. 703, where a landlord agreed during the term to make certain alterations required by building inspectors.

<sup>29</sup> Serio v. Murphy, 99 Md. 545, 58 Atl. Rep. 435. A notice of the building department which has

been properly served upon the owner and the lessee's executors, to the following effect: *inter alia*, "You are required to make all safe," is an "order" by the building department within a covenant of a lease requiring the tenant to comply with all orders and regulations of all the municipal departments. Markham v. David Stevenson Brewing Co., 93 N. Y. Supp. 684.

<sup>31</sup> Clark & Stevens Co. v. Gerke (Md. 1906), 65 Atl. Rep. 326.

other city department and also to surrender the premises at the end of the term in as good condition as when received is not thereby bound to pay the expense of removing a number of stone steps and a railed areaway which extended into the street and which were ordered removed by the city authorities.<sup>32</sup>

**§ 514. The landlord's promise to repair made during the term.** The promise of the landlord, who is under no legal obligation to repair, made after the lease is entered upon, that he will repair, if made to a tenant without consideration other than the tenancy is a mere *nudum pactum* and is not enforceable by the tenant.<sup>33</sup> So, too, where the roof of the demised premises has been destroyed by fire the oral guarantee by the landlord that the goods of his tenant shall not be injured by the weather is void as being without consideration and it does not exempt the tenant from his duty to protect his goods from the elements.<sup>34</sup> So, also, the landlord's promise to repair based solely upon the relinquishment by the tenant of his expressed intention to abandon the premises before the end of his term is void. The tenant

<sup>32</sup> City of New York v. United States Trust Co., 101 N. Y. Supp. 574.

<sup>33</sup> Fowler Cycle Works v. Fraser & Chalmers, 110 Ill. App. 126, 129; Blake v. Ranous, 25 Ill. App. 490; Watson v. Moulton, 100 Ill. App. 560, 39 Atl. Rep. 767; Reeves v. Hyde, 14 Ill. App. 233; Libbey v. Tolford, 48 Me. 316, 318, 77 Am. Dec. 229; Rhoades v. Seidel, 12 Det. Leg. N. Rep. 17, 102 N. W. Rep. 1025; Wynne v. Haight, 27 App. Div. 7, 50 N. Y. Supp. 187, 84 N. Y. St. Rep. 187; Watson v. Almirall, 70 N. Y. Supp. 662, 61 App. Div. 662, 104 N. Y. St. Rep. 662; Bronner v. Walter, 44 N. Y. Supp. 583; Hall v. Beston, 16 Misc. Rep. 528, 39 N. Y. Supp. 979, affirmed 165 N. Y. 632, 59 N. E. Rep. 1123; Gottsberger v. Radway, 2 Hilt. (N. Y.) 242; Clyne v. Holmes, 61 N. J. Law, 358; Philips

v. Monges, 4 Whart. (Pa.) 226; Dillon v. Carroll, 2 Luz. L. R. 89; White v. Campion, 1 W. N. C. (Pa.) 130; Lukens v. Hedley, 1 W. N. C. (Pa.) 266. An oral agreement by the landlord under a written lease to make improvements, cannot be proved unless under an allegation of fraud. Lerch v. Sioux City Times Co., 91 Iowa, 750, 60 N. W. Rep. 611. Where a landlord sues the tenant for the rent due on a written lease, the latter is precluded from showing that prior to, or when the lease was made, the landlord orally agreed to make repairs. Gulliver v. Fowler, 64 Conn. 556, 30 Atl. Rep. 852; Osborne v. Taylor, 58 Conn. 439, 20 Atl. Rep. 605; York v. Steward, 21 Mont. 515, 55 Pac. Rep. 29.

<sup>34</sup> Gavan v. Norcross, 117 Ga. 356, 43 S. E. Rep. 771.

is bound to retain the premises during the term whether the landlord repairs or not and his agreement to do what he is legally bound to do furnishes no consideration for the landlord's promise to repair made during the term.<sup>35</sup> But the making of repairs by a tenant whose lease does not require him to do, with a promise by him to pay a portion of the cost constitutes a sufficient consideration for an oral agreement by the landlord to pay the balance.<sup>36</sup> Where, however, the lease in providing that repairs shall be made at the tenant's expenses, also provides that by a special agreement the lessor may consent to pay for the same, an agreement to that effect subsequently made binds the lessor to pay for the repairs when they are made though it does not release the lessee from his liability under the covenant to make them.<sup>37</sup> But generally an independent parol agreement to repair made by the landlord prior to the written lease and for which the written lease was consideration, may be enforced by the tenant.<sup>38</sup> Where a tenant covenanted to keep the premises in repair and in a safe and proper condition, it was held that oral representations by the landlord made prior to the execution of the lease that he would make all substantial repairs

<sup>35</sup> Proctor v. Keith, 12 B. Mon. (Ky.) 252; Eblin v. Miller, 78 Ky. 371, 372; Speckels v. Sax, 1 E. D. Smith (N. Y.) 253, see contra, Beakes v. Holzman, 94 N. Y. Supp. 33; Dunn v. Robins, 20 N. Y. Supp. 341, 65 Hun, 625, and compare Neglia v. Lielouka, 65 N. Y. Supp. 500, 32 Misc. Rep. 707. The rule in Massachusetts is that the continuance in possession of the tenant during the balance of the term is a good consideration for a promise on the part of the landlord made during the term to make certain improvements in the demised premises which are required by an order of the building department. If, having made the promise to make the improvements the landlord neglects to do so for an unreasonable time the tenant may, even without his consent

and without notice to him, though of course notice to the landlord is advisable, make the improvements at his own expense and recover the amount thus expended in an action on the agreement of the landlord. Taylor v. Finnegan, 189 Mass. 568, 76 N. E. Rep. 203.

<sup>36</sup> Woodworth v. Thompson, 44 Neb. 311, 62 N. W. Rep. 450. A parol agreement by a landlord to repay the tenant for remedying certain defects in alterations which were voluntarily made in the premises by the landlord is valid, though the tenant had expressly covenanted to repair. Oettinger v. Levy, 4 E. D. Smith (N. Y.) 288.

<sup>37</sup> Peticolas v. Thomas, 9 Tex. Civ. App. 442, 29 S. W. Rep. 442.

<sup>38</sup> Mann v. Nunn, 43 L. J. C. P. 241, 30 L. T. 526.

leaving only ordinary repairs to be made by the tenant, were merged in the lease.<sup>39</sup>

**§ 515. The landlord's liability on his covenant to repair.** The landlord's covenant to repair binds him not only to keep the premises in good condition but also to put them in good condition though the tenant may have entered. Hence, a lessor's covenant to keep premises in good repair is not necessarily equivalent to an agreement to keep them in the same condition as they are when they were leased. The premises may be, when leased, so old and dilapidated as to be uninhabitable and to claim that the owner of the premises may, with the knowledge of their condition, lease them for the purpose of a dwelling house or hotel, for example, with an express covenant on his part that he will keep them in repair and yet be under no obligation to put the premises in a habitable condition is contrary both to common law and to common sense. If the lessor covenants to keep the premises in repair, he must put them in such a condition that they shall be reasonably fit for the occupation of the tenant. He must put the premises in good repair and keep them so under his covenant though he might not have to do either if he had not covenanted to do so. To construe a lessor's covenant to keep in repair otherwise would be simply permitting him to maintain the premises in the state in which they were leased and if they were dilapidated, uninhabitable and out of repair at that time he might permit them to continue to be so during the whole lease and yet satisfy his covenant to keep in repair.<sup>40</sup> A covenant to make premises tenantable before a lessee shall be bound to occupy them or the rent begin is a condition precedent and the lessee is not bound until it is complied with. And if the landlord, having made such a covenant, fails to keep it, the tenant may recover any rent which he has paid in advance.<sup>41</sup> The covenant of the landlord to repair generally will be construed with reference to the condition of the building and its locality and use. A covenant by a landlord of

<sup>39</sup> Nicoll v. Burke, 78 N. Y. 581. ~ 269, 33 Barb. (N. Y.) 401; Hexter

<sup>40</sup> Miller v. McCardell, 19 R. I. 304, 307, 33 Atl. Rep. 445; Ward v. Kelsey, 38 N. Y. 80; White v. Albany Railway Co., 17 Hun (N. Y.) 98; Myers v. Burns, 35 N. Y.

269, 33 Barb. (N. Y.) 401; Hexter v. Knox, 63 N. Y. 561; Stewart v. Lanier House Co., 75 Ga. 582; Mantz v. Garing, 4 Bing. N. C. 451; Stanley v. Towgood, 3 Bing. N. C. 4.

a newly constructed warehouse, that he would keep the main walls and main timbers of the warehouse in good repair, binds him to put the walls and timbers in good repair as regards the class of buildings to which the warehouse belongs and not merely to the condition of the particular building.<sup>42</sup> The landlord who rents a building for a particular purpose with an agreement to keep it in repair, must keep it in such a state of repair as this purpose requires.<sup>43</sup> A covenant by the landlord to keep the premises in proper repair and condition so as to be used by the tenant for a particular purpose, refers only to their physical condition and does not bind the landlord to procure a license where a statute is passed subsequently forbidding the use of the building for that purpose without a license from the government.<sup>44</sup> The landlord is liable on an action based upon his express covenant to repair solely to the tenant or to his assignee. The breach of a landlord's covenant to repair the premises cannot be taken advantage of by a stranger to the

<sup>41</sup> Fallis v. Gray, 115 Mo. App. 253, 91 S. W. Rep. 175. The taking of possession by the tenant with the payment of rent thereafter for a part of the term, prevents him from pleading that the lease was made upon the condition that it should not be effective until the landlord should make repairs. This is only a presumption, however, and the contrary may be shown by parol evidence. Hallenbeck v. Chapman, 73 N. J. Law, 201, 63 Atl. Rep. 498. In Payne v. Haine, 16 Mee. & W. the court said by Parke, B.: "If, at the time of the demise, the premises were old and in bad repair, the lessee was bound to put them in good repair as old premises, for he cannot keep them in good repair without putting them in it. He might have contracted to keep them in the state in which they were at the time of the demise. This is a contract to keep the premises in good repair as old premises, but

that cannot justify the keeping them in bad repair because they happen to be in that state when the defendant took them. The cases all show that the age and class of the premises let, with their general condition of repair, may be estimated in order to measure the extent of the repairs to be done. Thus a house in Spital-fields may be repaired with material inferior to those requisite for repairing a mansion in Grosvenor Square, but this lessee cannot say he will do no repairs, or leave the premises in bad repair, because they were old and out of repair when he took them. He was to keep them in good repair, and in that state, with reference to their age and class, he was to deliver them up at the end of the term."

<sup>42</sup> Saner v. Bilton, 47 L. J. Ch. 267, 7 Ch. D. 815, 38 L. T. 281, 26 W. R. Rep. 394.

<sup>43</sup> Riley v. Peltis Co., 96 Mo. 318, 9 S. W. Rep. 906.

lease, as the basis of an action for damages caused to the stranger by the defective condition of the building arising from the landlord's failure to repair.<sup>45</sup> Nor can the tenant recover for injuries to his person or property in an action on the covenant of the landlord to repair. A tenant whose landlord has broken his contract to repair the demised premises cannot recover thereon for personal injuries resulting to him by reason of such breach. The tenant's only remedy is either to make the repairs himself and to deduct the cost of making such repairs from the rent, or, if the premises are rendered untenantable by reason of the landlord's failure and refusal to make the repairs called for by his stipulation to repair, to remove from the premises and sue to recover the expense and loss sustained by the eviction.<sup>46</sup> Such an agreement to repair on the part of the landlord refers solely to the condition of the premises for the purposes of their use by the tenant. It cannot be conceived that the parties to the covenant to repair had in view the destruction of life or any injury to the body or the health of the tenant which might accidentally occur by reason of the premises being in disrepair. Loss of life or limb is not the invariable natural consequence of a landlord's failure to repair and if either is imminent in any case where a landlord has expressly covenanted to repair the premises, the tenant has it in his power to prevent or avoid it by making the necessary repairs at his own expense and deducting from the rent the amount thus expended by him for the benefit of the landlord or by including the amount in his damages and bringing an action for the same. In other words damages for personal injuries caused by the landlord's failure to repair are too remote to be considered in an action for damages for a breach

<sup>44</sup> Newby v. Sharpe, 47 L. J. Ch. 617, 8 Ch. D. 39, 38 L. T. 583, 26 W. R. 685. A landlord who has contracted to repair is not bound thereby to cleanse the premises. Bird v. Elwes, 37 L. J. Ex. 91, L. R. 3 Ex. 255, 18 L. T. 727, 16 W. R. 1120.

<sup>45</sup> Clyne v. Holmes, 61 N. J. Law, 358, 39 Atl. Rep. 767; Wilcox v. Hines, 100 Tenn. 524, 45 S. W. Rep. 781; Sterger v. Van Siclen, 132 N. Y. 499, 30 N. E. Rep. 987,

44 N. Y. St. Rep. 863; Odell v. Solomon, 99 N. Y. 635, 1 N. E. Rep. 408; Brogan v. Hanan, 55 A. D. 92, 66 N. Y. Supp. 1066, *contra*; Sontag v. O'Hare, 73 Ill. App. 432; Schwandt v. Metzger Linseed Oil Co., 93 Ill. App. 365.

<sup>46</sup> Spero v. Levy, 43 Misc. Rep. 24, 86 N. Y. Supp. 869; Miller v. Rinaldo, 47 N. Y. Supp. 336, 21 Misc. Rep. 470, 81 N. Y. St. Rep. 636, reversing 45 N. Y. Supp. 1145, 20 Misc. Rep. 714.

of covenant to repair. All that can with propriety be considered as elements of damages in such a case is the pecuniary loss to the defendant in so far as he has been deprived of the beneficial use of the demised premises and all expenditures made by him in putting the premises in a proper condition of repair.<sup>47</sup> So, the wife of a tenant who was injured in consequence of the defective condition of the premises which the landlord had agreed to repair has no cause of action against the landlord. The wife is not in a better position to recover damages than a customer or guest of a tenant.<sup>48</sup>

**§ 516. Landlord's right to notice of the necessity for repairs.** A landlord who has expressly covenanted to repair is entitled to have due notice from the tenant of the want of repair in the premises.<sup>49</sup> For the landlord is not required to inspect the

<sup>47</sup> Sanders v. Smith, 5 Misc. Rep. 1, 25 N. Y. Supp. 125; Tuttle v. Manufacturing Co., 145 Mass. 169, 13 N. E. Rep. 465, 467; Flynn v. Hatton, 43 How. Pr. (N. Y.) 333; Walker v. Swayzee, 3 Abb. Pr. (N. Y.) 138; Arnold v. Clark, 45 N. Y. Super. Ct. 252; Kabus v. Frost, 50 N. Y. Super. Ct. 74; Spellman v. Banigan, 36 Hun (N. Y.) 174, 175. "The breach of that duty makes a contract debt. It does not constitute negligence and makes the defendant liable in tort for plaintiff's damages." By the court in Sanders v. Smith, 23 N. Y. Supp. 125, expressly disapproving the decision in Edwards v. Railroad Co., 98 N. Y. 248 and characterizing it as *obiter dicta*.

<sup>48</sup> Cavalier v. Pope, 75 Law J. K. B. 609 [1906] App. Cas. 428, 95 Law T. 65, 22 Times Law R. 648.

<sup>49</sup> Henley v. Brockman, 124 Ga. 1059, 53 S. E. Rep. 672; Caldwell v. Snow, 8 La. Ann. 392; Favrot v. Mettler, 21 La. Ann. 220; Walker v. Gilbert, 2 Rob. (N. Y.) 214; Cooke v. England, 27 Md. 14; Ploen v. Staff, 9 Mo. App. 309; Wolcott v.

Sullivan, 6 Paige Ch. (N. Y.) 117; Thomas v. Kingsland, 12 Daly (N. Y.) 315, affirmed in 108 N. Y. 616, 14 N. E. Rep. 807; Makin v. Wilkinson, 23 L. T. Rep. N. S. 473, L. Rep. 6 Ex. 25, approved and followed in London and South Western Railway Company v. Flower, 33 L. T. Rep. N. S. 687, 1 C. P. Div. 77; Manchester Bonded Warehouse Co. v. Carr, 49 L. J. C. P. 809, 5 C. P. D. 507, 43 L. T. 476, 29 W. R. 354, 45 J. P. 7. But see *contra* Hayden v. Bradley, 6 Gray (Mass.) 425, 66 Am. Dec. 421, where the lease expressly permitted the lessor to enter to view and to make improvements. A landlord who has agreed to repair must have notice from his tenant of the necessity for the repairs. Makin v. Watkinson, 40 L. J. Ex. 33, L. R. 6 Ex. 25, 23 L. T. 592, 19 W. R. 286, in which the rule laid down by Moore, J., in re Clark, 5 Taunt., 96, that the lessor may charge the lessee without notice as the lessor is not on the premises to see that repairs are wanting, while the

premises during the term of tenancy to ascertain if repairs are needed.<sup>50</sup> If, however, he actually knows that repairs are needed and he does not repair, the fact that formal notice was not given to him by the tenant is no defense and the same is true where he agrees to repair without notice.<sup>51</sup> The lessor is not entitled to notice if the repairs are the result of his own negligence. A stipulation that the lessor shall not be responsible for damages arising from a leaky roof, unless he shall fail or refuse to repair it within a reasonable time after receiving a written notice that it is leaky, does not apply to a leak which is the result of the landlord's negligent use of the roof in allowing it to be occupied by a structure which caused holes to be made in the roof.<sup>52</sup> The landlord also has a reasonable time after notice to make the repairs<sup>53</sup> depending always on the circumstances. Hence, the tenant cannot make the required repairs which the landlord has agreed to make and compel the landlord to pay for them until he has first notified the landlord and the latter has unreasonably delayed to repair.<sup>54</sup> So, where by an express statute the duty of keeping the premises in good repair and in a tenantable condition is cast upon the landlord, the tenant is usually required by the statute to give him due notice of the condition of the building and the need of repair and he cannot abandon the premises because they are untenantable and thus relieve himself from the liability to pay rent under his covenant unless, upon discovering the condition of the premises, he

lessee is and therefore the lessee cannot charge the lessor for breach of repairs without notice for the lessor cannot know that repairs are wanting, was discussed. See also *Horsefall v. Tester*, 7 *Taunt.* 385; *Slater v. Stone*, Cro. Jac. 645, and compare *Baylis v. Le Gros*, 4 Com. Bench N. S. 537; *Goatley v. Paine*, 2 Camp. 520; *Morecraft v. Menx*, 1 Car & P. 346, where a tenant has not notified the landlord to repair the latter is not liable to a stranger who is on the premises by invitation of the ten-

ant. *Ploen v. Staff*, 9 Mo. App. 309.

<sup>50</sup> *Channel v. Merrifield*, 106 Ill. App. 243.

<sup>51</sup> *Cummings v. Ayer*, 188 Mass. 292, 74 N. E. Rep. 336.

<sup>52</sup> *Pratt, Hurst & Co. v. Tailer*, 100 N. Y. Supp. 16.

<sup>53</sup> *Walker v. Gilbert*, 2 Rob. (N. Y.) 214; *Seiber v. Blanc*, 76 Cal. 173.

<sup>54</sup> Where a lessor covenants to repair "during the tenancy" no special time being mentioned a notice is necessary. *Gerzebeck v. Lord*, 33 N. J. Law 240.

promptly notifies the landlord of such condition and gives him a reasonable time to repair or to rebuild.<sup>55</sup>

**§ 517. The lessor's right of entry on the premises to make repairs.** A lessor who is bound by the lease to make repairs during the term has a right to enter upon the premises and to remain thereon during the term a sufficient time to make the repairs which he has covenanted to make, without the express consent or license of the lessee. The lessor's express covenant to repair raises by implication a covenant on the part of the lessee to permit him to enter upon the premises for the purpose of repairing and the entry of the lessor for such purpose necessary under his covenant is neither a trespass nor an eviction, though it may result in great inconvenience to the lessee.<sup>56</sup> But a landlord who is under no express covenant to repair, who enters on the demised premises during the term to make ordinary repairs is guilty of a trespass unless there is a stipulation in the lease permitting him to do so without the consent of the tenant.<sup>57</sup> He may not enter without the consent of his tenant

<sup>55</sup> *Green v. Redding*, 92 Cal. 548, 28 Pac. Rep. 599, 600. See also *Tatum v. Thompson*, 86 Cal. 203, 24 Pac. Rep. 1009; *Van Every v. Ogg*, 59 Cal. 563, 565, construing Code Civil §§ 1932, 1941 and 1942. A provision in a lease that the landlord must "forthwith" after notice of damage, make repairs, means within a reasonable time or without unnecessary delay. And the tenant after waiting a reasonable time, may remove from the premises if he has been deprived of the use of the same by the failure of the landlord to make repairs. A delay of nine days under such circumstances is not a reasonable delay. *Nimmo v. Harway*, 23 Misc. Rep. 126, 50 N. Y. Supp. 686.

<sup>56</sup> *Kaufman v. Clark*, 7 D. C. 1; *Marks v. Gartside*, 16 Ill. App. 177; *Barron v. Liedlogg*, 95 Minn. 474, 104 N. W. Rep. 289; *Pontalba*

v. *Domington*, 11 La. 192; *Caffin v. Redon*, 6 La. Ann. 487; *Bonnecaze v. Beer*, 37 La. Ann. 531; *Schutz v. Corn*, 5 N. Y. St. Rep. 191. A covenant by the lessor to repair implies a license for him to enter, though he has covenanted for quiet enjoyment. *Saner v. Bilton*, 47 L. J. Ch. 267, 7 Ch. D. 815, 38 L. T. 281, 26 W. R. 394.

<sup>57</sup> *Barker v. Barker*, 3 Car. & C. 557; *Stocker v. Planet Building Society*, 27 W. R. 877. An express provision in the lease that the landlord may enter to make repairs during certain months gives him no right to enter for that purpose at any other time. Such a stipulation will be strictly construed in favor of the tenant. The fact that repairs are necessary because of the unsafe condition of the premises at another time does not give the landlord a right to enter in the absence of an express

though his tenant has failed to keep his covenant to repair and the landlord enters by the permission of subtenants in possession to prevent a forfeiture for nonrepair. The landlord may enter without the consent of the tenant where the latter is guilty of wasting the premises. So, when a landlord is compelled to repair during the tenancy in order to prevent permissive waste, he has a right to enter in order that he may do so without the consent of the tenant.<sup>58</sup> And a tenant who by complaining to a board of health compels the landlord to enter upon the premises in order to repair the plumbing, will be presumed from his complaint to have given his consent to such an entry.<sup>59</sup> The tenant's consent to an entry by the landlord to repair will be presumed *prima facie* to have been obtained fairly and honestly and the tenant will have the burden of proof to show the contrary in his action of trespass.<sup>60</sup> The landlord who enters to make necessary repairs without the express consent of the tenant is liable if he disturbs the tenant's possession and enjoyment more than is absolutely essential to put and to keep the premises in the same condition they were when the lease was made or to remedy defects amounting to a nuisance.<sup>61</sup> The lessor enjoys no right by implication to enter and to make extensive and important alterations under the guise of making necessary repairs which he is bound to make by a covenant. The tenant may consent that the landlord shall enter to make alterations but a tenant who gives the landlord a license to enter to make alterations or repairs generally or such alterations as he pleases where the landlord is not bound to repair is only creating a license which may be revoked at any time before the landlord enters upon the work.<sup>62</sup> The tenant is not entitled to damages

provision to that effect or the obligation upon him to repair under a covenant in the lease. *Goebel v. Hough*, 26 Minn. 252, 255, 2 N. W. Rep. 847.

<sup>58</sup> *Sulzbacher v. Dickie*, 51 How. Pr. (N. Y.) 500. The landlord must specially plead the condition of the building and the waste as a justification for his entry where the tenant sues him in trespass for an entry during the term, as

a plea of not guilty is merely a denial of the trespass. *Comstock v. Oderman*, 18 Ill. App. 326, 328, citing 1 Chitty on Pleading, 534; *Olson v. Upsahl*, 69 Ill. 273.

<sup>59</sup> *Dexter v. King*, 8 N. Y. Supp. 489, 28 N. Y. St. Rep. 750.

<sup>60</sup> *Marks v. Gartside*, 16 Ill. App. 177, 180.

<sup>61</sup> *Kaufman v. Clark*, 7 D. C. 1; *Butler v. Cushing*, 46 Hun, 521.

<sup>62</sup> *Fargis v. Walton*, 107 N. Y.

for the interruption of his business while a landlord is making repairs which he was bound to do on request.<sup>63</sup> Where a lease reserves to a landlord the right to enter and make repairs, he is not liable to the tenant for any damages resulting from the exercise of his right unless he repairs in an unskillful and neglectful manner.<sup>64</sup> Nor will such reservation to permit the landlord to enter at reasonable hours to examine for necessary repairs allow him to enter and to build additional stories on the premises, to interfere with the tenant's signs, and to injure his business by carrying on a business which competes with it in the portion of the building which he has added.<sup>65</sup>

**§ 518. The negligence of the landlord in voluntarily making repairs.** Though a landlord is not bound to repair in the absence of an express covenant to repair and though his promise to repair made subsequently to the execution of the lease, is without consideration and hence is unenforceable, yet if he shall voluntarily and gratuitously undertake during the term to repair the demised premises, he is bound, in doing so, to use ordinary care and diligence. He may be responsible for his negligence or lack of care and skill or the negligence of his servants in doing what in the first place he was not bound to do.<sup>66</sup> The distinction is made between non-feasance and misfeasance of the landlord; in other words, the law distinguishes between the failure or refusal of a landlord to do what he has not promised

398, 14 N. E. Rep. 303. See Dwyer v. Carroll, 86 Cal. 298, 24 Pac. Rep. 1015.

<sup>63</sup> Ward v. Kelsey, 42 Barb. (N. Y.) 582.

<sup>64</sup> Turner v. McCarthy, 4 E. D. Smith (N. Y.) 247; Worthington v. Parker, 11 Daly (N. Y.) 545. The landlord's entry to make necessary repairs without the tenant's consent on the requirement of the department of buildings, is not a breach of a covenant for quiet enjoyment. White v. Thurber, 55 Hun. 447, 8 N. Y. Supp. 661, 29 N. Y. St. Rep. 661, 2 Silv. S. Ct. 119. Nor is his entry to repair in case of fire an eviction where no rent was to be paid

while the premises were unfit for occupancy. International Press Ass'n v. Brooks, 30 Ill. App. 114; Smith v. McLean, 22 Ill. App. 451, affirmed 14 N. E. Rep. 50, 123 Ill. 210; Gulliver v. Fowler, 30 Atl. Rep. 852, 64 Conn. 556.

<sup>65</sup> Hessler v. Schafer, 46 N. Y. Supp. 1076.

<sup>66</sup> Gregor v. Cady, 82 Me. 131, 136, 19 Atl. Rep. 108, 17 Am. St. Rep. 466; Gill v. Middleton, 105 Mass. 477, 7 Am. Rep. 548; Martin v. Richards, 155 Mass. 381, 386, 29 N. E. Rep. 591; Galvin v. Beals, 187 Mass. 250, 72 N. E. Rep. 969; Shute v. Bills (Mass. 1906), 78 N. E. Rep. 96.

to do or is not legally bound to do and his doing it in a negligent manner. In the case of a promise without consideration, no damages can be given for its non-performance. But if the landlord voluntarily repairs and actually enters upon the carrying out of his scheme of repair, he will be responsible for his want of due care in the execution of the work upon the principle of liability for negligence without reference to any question of implied contract to repair or implied consideration.<sup>67</sup> This rule applies in all cases whether the landlord does or attempts to do the work of repairing with his own hands, or has it done by others in his employ under his personal supervision and control. If he hires it to be done by an independent contractor, he is not responsible for damages if he selects a suitable person as contractor to do the work of repair and a tenant is injured by reason of the negligence of the person so selected or of an employee or servant of such person. The tenant must show that the landlord was negligent in not selecting a proper person to do the work before the landlord can be held for the negligence of an independent contractor making repairs. Mere proof of negligence in making the repairs on the part of the independent contractor is not sufficient to show that the landlord was negligent in not hiring a suitable person.<sup>68</sup> The landlord of a building which is occupied by tenants leasing separate floors or apartments, must take care in licensing any one of his tenants to make alterations or repairs that no injury results to his other tenants. He will not be responsible to a tenant for mere inconvenience or other damage which results from the making of re-

<sup>67</sup> Mann v. Fuller, 63 Kan. 664, 66 Pac. Rep. 627; Little v. McAdaras, 38 Mo. App. 187; Blake v. Fox, 17 N. Y. Supp. 508; Eblin v. Miller's Ex'r, 78 Ky. 371, 374; McGee v. Bast, 6 N. J. Marsh (Ky.) 455; Bancroft v. Godwin, 41 Wash. 253, 83 Pac. Rep. 189; Gill v. Middleton, 105 Mass. 470, 477, 7 Am. Dec. 548; Blumenthal v. Prescott, 75 N. Y. Supp. 710, 70 App. Div. 560.

<sup>68</sup> Eblin v. Miller's Ex'r, 78 Ky. 371, 375; Fitzgerald v. Timoney, 34 N. Y. Supp. 460; O'Connor v.

Schnepel, 33 N. Y. Supp. 562, 563; Upham v. Head, 74 Kan. 17, 85 Pac. Rep. 1017. Under a lease which requires the tenant to make all repairs, a landlord who on the failure of the tenant to repair enters upon the premises with the consent of the tenant and re-builds a wall thereon, thereby waives the tenant's liability to make repairs and at the same time he is liable to the tenant for a lack of ordinary care. McHenry v. Maar, 39 Md. 510, 530.

pairs by another tenant with his consent so long as the repairs are properly and carefully made. But if he permits or authorizes the tenant on an upper floor in premises owned by him and occupied by several tenants in separate apartments, to make material repairs or changes and alterations in his premises for the purpose of rendering them more convenient and better adapted to the use of the tenant who makes the repairs, he will be responsible if the tenant who makes the repairs is guilty of negligence resulting in damage to the other tenants. It is the duty of the landlord to exercise ordinary care to see that the repairs or alterations are carefully and properly made, and he will be liable if he shall fail to do so. In such circumstances though he is not actively negligent himself, he is responsible for permitting another over whom he can exercise control to be negligent and though the injured tenant may have his action against the negligent tenant, he may also have his action against the landlord who consented to the negligence.<sup>69</sup> The duty to re-construct a building which is out of repair carefully and skillfully so as not to injure a tenant in possession is an absolute duty which the landlord cannot delegate. He will therefore be responsible for the negligence of a person who is hired by a tenant at the request of the landlord to make repairs at the expense of the landlord. In this case it was held immaterial whether those who did the work were or were not independent contractors. So, also, under the circumstances above mentioned, the landlord's liability for injury caused by negligent reconstruction cannot be defeated by showing that the work was to be paid for by the tenant whom the landlord had directed to have the building repaired. The fall of the building in the course of repair is *prima facie* proof of negligence.<sup>70</sup> A covenant on the part of the landlord to repair buildings partially destroyed by fire and the elements, which in fact was an agreement to restore them to a condition similar to or equally as good as they were at the date of their partial destruction, is a personal covenant to repair; hence, the covenantor has no power to delegate his duty to perform a covenant to another, and his doing so does not release him from the responsibility for the

<sup>69</sup> Myhre v. Schleuder, 98 Minn. 133, 111 N. W. Rep. 752, 14 Det. 234, 108 N. W. Rep. 276. Detroit Leg. N. 121.

<sup>70</sup> Blickley v. Luce, 148 Mich.

negligence of the person with whom he has made a contract to have the repairs done.<sup>71</sup>

**§ 519. Repairs by the landlord as a condition precedent to the occupation of the premises and payment of rent by the tenant.** In the majority of instances the covenant of the tenant to pay rent and the covenant to repair, or to improve the premises by the landlord are independent covenants the performance of neither of which depends upon the performance of the other. Hence, generally speaking, the performance by the landlord of his covenant to repair is not a condition precedent to the recovery of rent by him on the covenant of the tenant to pay rent.<sup>72</sup> So, performance by the lessor of a saw mill of a covenant to furnish timber to be sawed at the mill and to keep roads leading to the mill in repair during the term, is not a condition precedent to the payment of rent by the lessee of the mill.<sup>73</sup> It has been held in one case that a covenant to pay rent is not dependent on a covenant by the lessor to deliver the premises in good condition and repair,<sup>74</sup> or on the covenant to put them in good order and to put up fences where no time is specified when this shall be done.<sup>75</sup> On the contrary, however, if from the words of the lease it is clearly apparent that the rent was to be paid by the tenant only after the doing of some act by the landlord which he expressly agrees to do in the lease before this liability for rent shall accrue, the doing of such act by the landlord is a

<sup>71</sup> Eberson v. Continental Inv. Co., 118 Mo. App. 67, 93 S. W. Rep. 297.

<sup>72</sup> Hill v. Bishop, 2 Ala. 320; Lewis v. Chisolm, 68 Ga. 40; Bryan v. Fisher, 3 Blackf. (Ind.) 316, 319; Thomson Houston Electric Co. v. Durant Land Imp. Co., 144 N. Y. 34, 39 N. E. Rep. 7, affirming 4 Misc. Rep. 207, 53 N. Y. St. Rep. 467, 23 N. Y. Supp. 900; Newman v. French, 45 Hun (N. Y.) 65; Allen v. Culver, 3 Denio. (N. Y.) 284; Walters v. Snow, 32 N. Car. 292; Obermyer v. Nichols, 6 Binn. (Pa.) 159, 6 Am. Dec. 439; Kirland v. Wolf, 3 Wkly. Law Bul. (Ohio) 114; Smith v. Wiley, 1 Baxt. (Tenn.) 418, 420; Young v.

Burhans, 80 Wis. 438, 50 N. W. Rep 343. But in Sigmund v. Newspaper Co., 82 Ill., it was said that the covenant to repair by the lessor, and the covenant to pay rent were mutual and dependent covenants, and that where a lease containing such covenants was binding upon only one of the parties, it was void because of lack of mutuality.

<sup>73</sup> McCoy v. Hill, 2 Litt. (Ky.) 372.

<sup>74</sup> Thompson Houston Elec. Co. v. Durant Land Imp. Co., 144 N. Y. 34, 39 N. E. Rep. 7.

<sup>75</sup> Walters v. Snow, 32 N. Car. 292, 294.

condition precedent to the payment of rent by the tenant and the tenant may refuse to pay rent until this act is done.<sup>76</sup> Thus, if the landlord covenants in the lease or in an agreement for a lease to put the premises in repair or to complete unfinished premises, or to make improvements in the premises before the term commences and the term is to commence in the future, the performance of the covenant to repair the premises or to put them in good condition, or to complete them is a condition precedent to the performance by the tenant of his covenant to pay rent. If the premises are not repaired, completed or improved by the day on which the term is to begin, the tenant need not enter and is discharged from the payment of rent.<sup>77</sup> If, under such circumstances, the tenant goes into possession, when the term begins he will be held to have waived the performance of these conditions precedent and he must pay rent under his covenant to do so.<sup>78</sup> Where the landlord agrees to repair before a certain day shall have arrived which does not arrive until after the term begins, the entry of the tenant at the beginning of the term upon the premises is not a waiver. If from the lease it is apparent that the making of repairs or improvements on or before a specified date during the term was a condition precedent to the payment of subsequent rent, the tenant may on the default of the landlord, abandon the premises and escape liability for rent subsequently accruing, and, under particular circumstances, he may not be chargeable even for rent which has accrued. The tenant must act promptly and he must abandon the premises at once as soon as the landlord's breach of

<sup>76</sup> Baird v. Evans, 20 Ill. 29, 31; Barnes v. Strohecker, 17 Ga. 340, 344.

<sup>77</sup> Kiernan v. Germain, 61 Miss. 498, 503; Baird v. Evans, 20 Ill. 29, 31; Barnes v. Strohecker, 17 Ga. 340, 344; Reno v. Mendenhall, 58 Ill. App. 87; Elsas v. Meyer, 10 Ohio Dec. 518, 21 Bull. 346; Tidey v. Mollett, 16 C. B. (N. S.) 298, 33 L. J. C. P. 235, 10 Jur. (N. S.) 800, 10 L. T. 380, 12 W. R. 802.

<sup>78</sup> Reno v. Mendenhall, 58 Ill. App. 87; Roach v. Peterson, 47 Minn. 462, 50 N. W. Rep. 601; Kier-

uan v. Germain, 61 Miss. 498, 503; Harger v. Edmonds, 4 Barb. (N. Y.) 256; La Farge v. Mansfield, 31 Barb. (N. Y.) 345; *contra*, Strohecker v. Barnes, 21 Ga. 430. So the entry of the tenant and his expression of satisfaction with premises on a term which was to begin when the premises shall be "finished and ready for the occupation of the lessees is not a waiver of his claim that the premises were not finished." Clarke v. Spaulding, 20 N. H. 313.

contract occurs for if he shall continue in possession during the whole term,<sup>79</sup> he will have to pay rent.<sup>80</sup>

**§ 520. A covenant by the landlord to repair farm fences.** As between the landlord and a tenant of farm land in the absence of any special covenant requiring the landlord to maintain the fences, it is encumbent on the tenant to do so.<sup>81</sup> He must maintain the fences substantially in the same condition that they were when he took the land. He may be liable to erect new fences in case of the total destruction of the existing fences.<sup>82</sup> He is entitled to use the wood found or grown on the farm out of which to build the fences. It is competent for the landlord to agree that he will build fences or will keep the fences in repair and this covenant by the ladnlord will doubtless be construed by the court by the rules which would be applicable to a general covenant by him to repair. A covenant by a lessee to keep fences in proper repair, the material for which is to be furnished by the lessor, is an absolute covenant on his part and it is not qualified by the words "the material for which to be furnished by the lessor," so that its performance is dependent on the lessor furnishing the material. The tenant may, in performing this covenant, use material found upon the premises so far as possible and he may purchase other necessary material if the landlord fails to furnish it on request and deduct the price from the rent. But the tenant must perform or attempt to perform before he can secure any abatement in his rent for the failure of the landlord to perform.<sup>83</sup> The tenant whose landlord has covenanted to repair fences may recover the expense of making the repairs himself.<sup>84</sup> But he cannot recover from his landlord for damages done by cattle owned by a third party who trespassed upon his land by reason of the fences being down.<sup>85</sup> And where the landlord agrees to build new fences, to

<sup>79</sup> Kiernan v. Germain, 61 Miss. 498, 503.

<sup>80</sup> Obermyer v. Nichols, 6 Binn. (Pa.) 159, 167, 6 Am. Dec. 439.

<sup>81</sup> Hoyleman v. Kanawha & O. R. Co., 33 W. Va. 489, 10 S. E. Rep. 816; Morgan v. Tims (Tex.), 97 S. E. Rep. 832; Windom v. Stewart, 43 W. Va. 711, 28 S. E. Rep. 776.

<sup>82</sup> Cheetham v. Hampson, 2 Ld. Raym, 804.

<sup>83</sup> Wood v. Sharpless, 174 Pa. St. 588, 38 W. N. C. 153.

<sup>84</sup> Wisdom v. Newberry, 30 Mo. App. 241.

<sup>85</sup> Wisdom v. Newberry, 30 Mo. App. 241; Parker v. Meadows, 86 Tenn. 81, 6 S. W. Rep. 49.

furnish new timber for keeping the old fences in repair, and to pay the tenant for his labor in repairing them, the measure of the tenant's damages for not building the new fences would be the loss to him in rental value of the farm and he cannot recover against the landlord for damages to crops destroyed because of the absence of fences.<sup>86</sup> As regards the rights of third persons and the obligation of the occupants of land to fence as against their cattle, it may be said that at common law the occupant of a close was not obliged to fence against the cattle of the occupants of an adjoining close unless by reason of some prescription or in an express agreement to do so.<sup>87</sup> But in most of the states of the Union by statute it is expressly provided that division fences must be erected and maintained. These statutes differ very widely in designating the particular person who shall be held liable for a violation of their provision. Some of them provide expressly that the duty and expense of maintaining division fences shall be imposed upon the owner of the land, while others place this duty upon the occupants of the land. Where an occupant is liable under a statute to fence and to repair fences, the tenant will be held liable to do so in the absence of an agreement by the landlord to perform this duty for him. In the state of New York the statute does not cast the duty to fence or repair fences upon the tenant; it remains upon the landlord or owner.<sup>88</sup> The owner must not only provide a proper, suitable and sufficient fence, even where his land is occupied by a tenant, but he must keep it in ordinary repair at the peril of being liable in damages for his negligence.<sup>89</sup> But a statute enacting that any person who shall construct or build a division fence of barbed wire shall be liable in treble damages for injuries caused thereby includes a tenant who constructs such a fence, and he is liable under the statute though the lease provided that the landlord will furnish the wire and posts and the lessee was only to do the work.<sup>90</sup>

<sup>86</sup> Parker v. Meadows, 86 Tenn. 81, 6 S. W. Rep. 49.

<sup>87</sup> D'Arcy v. Miller, 86 Ill. 102, 29 Am. Rep. 11; William v. New Albany & S. R. Co., 5 Ind. 111; Moore v. Levert, 24 Ala. 310.

<sup>88</sup> Roney v. Aldrich, 44 Hun, 320, 322, 323.

<sup>89</sup> Rehler v. Railway Co., 8 N. Y. Supp. 286, 23 N. Y. St. Rep. 311.

<sup>90</sup> Buckley v. Clark, 47 N. Y. Supp. 42, 21 Misc. Rep. 138, 81 N. Y. St. Rep. 42.

**§ 521. The landlord's covenant to keep an elevator in constant repair.** A landlord who covenants to keep an elevator on the premises in constant repair which is to be used by the tenant in carrying on his business owes an active duty to the tenant. He must at his peril ascertain the exact condition and repair of the elevator at the date of the commencement of the term; and if the elevator is then out of repair he must put it in good repair and in safe condition and maintain it in a proper and perfect condition during the term. The general rule that no implied warranty as to the condition of the leased premises does not apply to such a case. And where the elevator is in an unsafe and defective condition at any time during the lease, it is no defense for the lessor, if he has covenanted to maintain it in a proper condition to show that he had no actual knowledge of the true state of the elevator. His duty was to know and his ignorance of its condition is no defense. These considerations flow out of the express agreement of the parties to the lease and force is added to them by the facts where the elevator and all its appurtenances, though for the benefit and use of the tenants, and in fact usually operated by one or more of them, were substantially within the exclusive control and supervision of the lessor.<sup>91</sup> The duty to keep in repair an elevator which is used by the several tenants of the building is upon a landlord, and a servant of one of the tenant's who is injured by reason of a defect in one of the gates of the elevator cannot hold his master liable, but must look to the owner of the building.<sup>92</sup>

**§ 522. Landlord's covenant to rebuild.** An express covenant to rebuild by the landlord in case of a total destruction by fire binds the covenantor to construct a new building in place of that destroyed of the material similar to that of which it was originally built. If the building which was destroyed was composed of wood he may erect a new building of the same material. And any minute divergence or difference in the plan or in the arrangement of the rooms between the old building and the new one which has been built to take its place, may be disregarded provided the two buildings are substantially identical and the new building adequately answers the purpose for which

<sup>91</sup> Olson v. Schultz, 67 Minn. 494, Co., 117 Mo. App. 322, 93 S. W. 70 N. W. Rep. 779, 781. Rep. 872.

<sup>92</sup> Andrus v. Bradley-Alderson

the former building was used by the tenant. And where, after the lessor has covenanted to rebuild a wooden building in case it is destroyed by fire, a municipal ordinance is passed forbidding the erection of wooden buildings in the future, the covenantor is released from his covenant and he cannot be compelled under this covenant to erect a brick building. The lessor has covenanted to rebuild the building which he leased. He did not promise to put up another and more expensive building in case he was prevented from doing that.<sup>93</sup> A different conclusion has been reached by the courts where a lessee has covenanted to repair and a wooden building was burned down after the municipal authorities had forbidden the erection of such structures. An ordinance of this sort does not in fact render the performance of a covenant to repair impossible; it simply makes its performance more expensive and more burdensome to the covenantor. And this fact alone cannot be held to exonerate the promisor from performing his covenant.<sup>94</sup>

**§ 523. The lessor's liability to the servants of a lessee.** A lessor whether or not he has covenanted to repair, is not liable

<sup>93</sup> Cordes v. Miller, 39 Mich. 581, 583, 32 Am. Rep. 430.

<sup>94</sup> David v. Ryan, 47 Iowa, 642, 645. The distinction is between an event rendering the performance of a covenant impossible and one rendering it simply more expensive. To repair premises and to rebuild them involve two widely different operations. To rebuild a wooden house necessarily implies that the person who is rebuilding it shall employ in its re-constructing material of the same character as was used in its original erection. Where this is forbidden by the law the performance of the covenant becomes at once illegal and hence its performance is impossible. A covenant to repair involves as is well known the absolute restoration of the premises in case of their total destruction and if the parties desire to limit its operations they must do so in the

lease in express terms. An ordinance forbidding the erection of a wooden building does not render a covenant to repair impossible of performance for the covenantor has agreed to repair and not merely to rebuild. The covenantor, under his promise to repair, must replace the building and if the law forbids him to replace it with one of a similar character to that destroyed he must replace it with a better one. A landlord who has covenants to rebuild the premises destroyed must do so in a reasonable time and, in case he shall refuse or neglect to do so, the lease may be cancelled in a court of equity, and the rent paid by the tenant after the destruction of the building, will be ordered to be returned to him. Lincoln Trust Co. v. Nathan, 175 Mo. 32, 74 S. W. Rep. 1007.

on his covenant to a servant or to an employee of the lessee for injuries received by reason of his failure to repair. He cannot be held liable on his covenant with the lessee because no privity exists between the lessor and the servant of the lessee. So, where the lessor has not covenanted to repair it is the duty of the lessee to maintain the premises in repair so far as they are in his exclusive control and he, and not the lessor, will be responsible if his employee is injured. The lessor has turned the complete possession and control of the premises over to his lessee and the latter during the term takes the place and assumes the duties of the lessor to keep the premises in repair as to all persons being upon the premises.<sup>95</sup>

**§ 524. The landlord's liability to the tenant for repairs made by the latter.** Inasmuch as the liability of the landlord to the tenant to repair or to rebuild the demised premises in case of their destruction rests solely upon express contract, it follows that in the absence of a special agreement or a statute providing for a different rule, the tenant cannot make repairs and by an action against the landlord compel him to repay him what he has expended. Nor can a tenant recover the value of permanent and fixed improvements which have been placed by him upon the premises in the absence of a contract with his landlord to that effect. The tenant is presumed to improve for his own benefit and the only right he has in return for what he expends for improvements is the right to enjoy the increased value of the premises during the term and under certain circumstances to remove the improvements during the term.<sup>96</sup> In order to

<sup>95</sup> Willson v. Treadwell, 81 Cal. 58, 22 Pac. Rep. 304; Crusselle v. Pugh, 67 Ga. 430, 44 Am. Rep. 724; Deller v. Hefferbach, 127 Ind. 414, 418; Freeman v. Hunnewell, 163 Mass. 210, 39 N. E. Rep. 1012; Dalton v. Gidson (Mass. 1906), 77 N. E. Rep. 1035; O'Brien v. Capwell, 59 Barb. (N. Y.) 497; Mulcahy v. New York Floating Dry Dock Co., 8 Daly (N. Y.) 93; Ryan v. Wilson, 87 N. Y. 471, 41 Am. Rep. 384, affirming 45 N. Y. Super. Ct. 273.

<sup>96</sup> Jones v. Hoard, 59 Ark. 42, 56 S. W. Rep. 193, 43 Am. St. Rep. 17; Gocio v. Day, 51 Ark. 47, 48, 9 S. W. Rep. 433; Independent Brewing Association v. Powers, 80 Ill. App. 471; Smith v. Kincaid, 1 Ill. App. 620; Biddle v. Read, 33 Ind. 529; Hopkins v. Ratliff, 115 Ind. 213, 217, 17 N. E. Rep. 288; Hedderich v. Smith, 103 Ind. 203, 205, 53 Am. Rep. 509; Mull v. Graham, 7 Ind. App. 561, 35 N. E. Rep. 134; Hovey v. Walker, 90 Mich. 527, 532, 51 N. W. Rep. 678; Petz v. Voight Brewing Co., 116 Mich. 418, 74 N. W. Rep. 651, 655; Heintze v. Bently,

entitle a tenant to recover from his landlord for repairs made by the tenant on the premises, he must show a contract express or implied, to pay for them.<sup>97</sup> The fact that a landlord voluntarily repairs for the benefit of his tenant, raises no presumption that he did so under an agreement on his part to repair.<sup>98</sup> The fact that the demised premises is a railroad does not affect the application of the common law rule that a lessor is never by implication bound to make repairs.<sup>99</sup> This rule is applicable to all repairs, whatever may be their character, extent or necessity. It applies not only to the ordinary repairs which are from time to time required in order to keep in good and safe condition premises which were in good repair and safe condition when hired, but also to repairs which are necessary in the case of premises which are out of repair when they were hired to put them in a habitable condition. The landlord may, as we have seen, make himself liable to the tenant to repair by a special agreement to that effect inserted in the lease. Where this is the case, it is the rule that the tenant may, after he has given notice to the landlord of the necessity for repairs and after a reasonable time has elapsed without the landlord having made the repair, make repairs himself and recover for the same from the

34 N. J. Eq. 562, 569; Mumford v. Brown, 6 Cow. (N. Y.) 475, 16 Am. Dec. 440; McCarty v. Ely, 4 E. D. Smith (N. Y.) 375; Sigur v. Lloyd, 1 La. Ann. 421, 423; McWilliams v. Hagan, 4 Rob. (La.) 374; Hollingsworth v. Atkins, 46 La. Ann. 515, 15 So. Rep. 77; Burns v. Fuchs, 28 Mo. App. 279; Powell v. Beckley, 38 Neb. 157, 161, 56 N. W. Rep. 974; Turner v. Townsend, 42 Neb. 376, 60 N. W. Rep. 587; Murphey v. Illinois Trust & Savings Bank, 58 Neb. 428, 77 N. W. Rep. 102; Woolley v. Osborne, 39 N. J. Eq. 54, 59; Berry v. Van Winkle's Ex'rs, 2 N. J. Eq. 390; Carnell v. Vanartsdalens, 4 Pa. St. 364; Lewis v. Effinger, 30 Pa. St. 281, 286; Kline v. Jacobs, 68 Pa. St. 57; Hanley v. Banks, 6 Okl. 79, 51 Pac. Rep. 664; Hitner v. Ege,

23 Pa. St. 305; Smith v. Brown, 5 Rich. Eq. (S. Car.) 291; Cantrell v. Fowler, 32 S. C. 589, 10 S. E. Rep. 934, 935; City Council of Charleston v. Moorhead, 2 Rich. Law (S. Car.) 430; Goedecke v. Baker (Tex. Civ. App. 1894), 28 S. W. Rep. 1039; Brown v. Burrrington, 36 Vt. 40; Kuttar v. Smith, 2 Wall. (U. S.) 491; In re Warren, 4 Ct. Cl. 526, 4 Kent, Comm. 110; Pilling v. Armitage, 12 Ves. 85; Watson v. Hospital, 14 Ves. 333.

<sup>97</sup> Powell v. Beckley, 38 Neb. 157, 56 N. W. Rep. 974.

<sup>98</sup> Moore v. Weber, 71 Pa. St. 429, 4 Lanc. Bar. No. 1, 3, Leg. Opin. 261.

<sup>99</sup> Felton v. City of Cincinnati, 95 Fed. Rep. 336, 340, 342, 37 C. C. A. 88.

landlord. Usually the failure of a landlord to repair may be the basis of a counterclaim or set off in an action for the rent brought by the landlord.<sup>1</sup> The tenant, however, is not always bound to do this. Hence, if by reason of the failure of the landlord to keep his covenant to make repairs, the premises become untenantable, or they are rendered so dilapidated that the tenant is thereby deprived of his beneficial use and enjoyment of them, he is not under the necessity to repair or rebuild, but he may abandon the premises, after notice to the landlord to repair and demand on the landlord as in the case of an eviction.<sup>2</sup> The non-liability of a landlord to repair applies to a tenant who is in possession under an oral lease and who, while in possession and on a promise of a written lease, puts in valuable improvements. He cannot thereafter recover the value of the improvements he has made while he is in possession, solely because the landlord does not give him the written lease. He must show that he has been evicted before he can recover from his landlord.<sup>3</sup> The rule is confined, however, to a tenant who, while in possession of the premises, repairs or adds improvements to render the use of the premises more convenient and beneficial. For where a tenant hires a building for a particular purpose and before he enters into its possession, makes improvements with the knowledge and the consent of the landlord, he may recover from the landlord the value of all repairs and improvements which have been made by him when, through the fault of the latter, the tenant is prevented from going into possession under the lease.<sup>4</sup> The tenant is not bound under such circumstances

<sup>1</sup> King v. Woodruff, 23 Conn. 56, 60 Am. Dec. 625; Lewis v. Chisholm, 68 Ga. 40; Perrett v. Dupre, 3 Rob. (La.) 52; Bostwick v. Losey, 67 Mich. 554, 35 N. W. Rep. 246; Hexter v. Knox, 63 N. Y. 561, 567, affirming 39 N. Y. Super. Ct. 109; Chadwick v. Woodward, 1 City Ct. R. Supp. 94; Jarvis v. Henwood, 25 N. J. Eq. 460, 465.

<sup>2</sup> Bostwick v. Losey, 67 Mich. 554, 35 N. W. Rep. 246. In this case a tenant was deprived of the use of a water mill which had been leased by him by reason of

the failure of the landlord to make repairs which he had agreed to make. The court expressly stated that the tenant was not bound to remain, and to make the necessary repairs and offset their cost against the rent but that he may recover in a separate action for damages after treating the failure of the landlord to keep his covenant to repair as an eviction.

<sup>3</sup> Yates v. Bachley, 33 Wis. 185, 189.

<sup>4</sup> Friedland v. Myers, 139 N. Y. 432, 437, 34 N. E. Rep. 1055, re-

and where he has a valid lease to wait until the beginning of the term to make the improvements but he may rely upon the implied covenant of the landlord in the lease to put him into possession when he has a right to possession and may proceed accordingly. The silence of the landlord with the knowledge that repairs and improvements are being made upon his premises will raise an implied promise on his part to pay for them in case he is unable to place the tenant in possession where alone he can derive any benefit from what he has paid out for the improvements and repairs.<sup>5</sup> A covenant by the landlord that he "will pay for all repairs," does not bind him to make the repairs himself, but only to pay for repairs made by the tenant and such a covenant is not broken by the landlord not making the repairs himself.<sup>6</sup>

§ 525. **The remedies of a tenant for the failure of his landlord to repair.** For a breach by the landlord of his covenant to repair the tenant has, according to the majority of the cases, an election of several remedies. *First.* If the failure to repair has rendered the premises uninhabitable by the tenant, he may treat the refusal of the landlord to repair as an eviction. He may abandon the premises and thus escape all liability for the payment of future rent.<sup>7</sup> *Second.* He may himself repair, after notice to his landlord that he will do so and deduct the costs of the same from the rent.<sup>8</sup> *Third.* He may continue to occupy the

versing 65 Hun, 619, 19 N. Y. Supp. 741.

<sup>5</sup> Where a person goes into possession of farm land under an oral agreement with the owner of the land that the owner would erect a house thereon and devise the premises to him the relation of landlord and tenant exists between the parties, and the occupant is bound to pay rent while in possession. He is also as regards repairs in the same position as any tenant and if he repairs or enlarges the premises cannot recover for the same from his landlord. Hopkins v. Ratliff, 115 Ind. 213, 216, 17 N. E. Rep. 288.

<sup>6</sup> Lomis v. Ruetter, 9 Watts. (Pa.) 516.

<sup>7</sup> McCardell v. Williams, 19 R. I. 701, 36 Atl. Rep. 719, see also substantially to the same effect. Lewis v. Chisolm, 68 Ga. 40; Bissell v. Lloyd, 100 Ill. 214; Sheary v. Adams, 18 Hun (N. Y.) 181; Prescott v. Otterstatter, 85 Pa. St. 534; Russell v. Rush, 2 Pitts. (Pa.) 134, 7 Pitts. L. J. (Pa.) 353; Broad v. Winsborough, 1 North Co. (Pa.) 330; Pierce v. Joldersma, 91 Mich. 463, 51 N. W. Rep. 1116.

<sup>8</sup> Wright v. Lattin, 38 Ill. 293; Myers v. Burns, 35 N. Y. 269; Sparks v. Bassett, 49 N. Y. Super.

premises without repairs, and he may then recoup the damages which have been sustained by him through a lack of repair in a counterclaim in an action by the landlord for the rent.<sup>9</sup> *Fourth.* He may pay rent and sue in a separate action for damages for a breach of the covenant to repair.<sup>10</sup> Many cases confine the tenant to a separate action on the landlord's covenant to repair. The covenant to repair by the lessor and the covenant to pay rent by the lessee are independent covenants and the breach of the former by the lessor does not relieve the tenant from the full performance of the latter except where the failure to repair is such that it will constitute an eviction in which case the lessor must abandon the premises.<sup>11</sup> But the failure of the landlord to repair does not permit the tenant to abandon the premises as for an eviction in a case where the landlord had not agreed to repair.<sup>12</sup> A covenant to repair or rebuild by the les-

270; *Thompson v. Clemens*, 96 Md. 196, 53 Atl. Rep. 919; *Favrot v. Mettler*, 21 La. Ann. 220; *Hexter v. Knox*, 63 N. Y. 561; *Buck v. Rodgers*, 39 Ind. 322; *Beakes v. Holzman*, 94 N. Y. Supp. 33; *Prescott v. Otterstatter*, 85 Pa. St. 534.

<sup>9</sup> *Westlake v. Degraw*, 25 Wend. (N. Y.) 669; *Long v. Gieriet*, 57 Minn. 278, 59 N. W. Rep. 194; *Rowe v. Baber*, 93 Ala. 422, 8 So. Rep. 865 (failure of the landlord to repair fence on a farm which resulted in stock breaking through and trampling on the tenant's crops). A lessee who continues to occupy and pay rent after repairs are agreed to be made by the landlord, does not waive such agreement where he expected such repairs would be made. *Silbar v. Ryder*, 63 Wis. 106.

<sup>10</sup> *Lewis v. Chisolm*, 68 Ga. 40; *Black v. Ebner*, 54 Ind. 544; *Buck v. Rogers*, 39 Ind. 222; *Harmony Co. v. Rauch*, 62 Ill. App. 97; *Reno v. Mendenhall*, 58 Ill. App. 87; *Mitchell v. Plaut*, 31 Ill. App. 148; *McBrier v. Marshall*, 126 Pa. St.

390, 17 Atl. Rep. 647; *Gillaspie v. Hagans*, 90 Cal. 90, 27 Pac. Rep. 34; *Tibbitts v. Percy*, 24 Barb. (N. Y.) 39, 43; *Mathis v. McCord*, *Wright (Ohio) 647.*

<sup>11</sup> *Meridith Mechanic Ass'n v. American Twist-Drill Co.*, 66 N. H. 267, 39 Atl. Rep. 330 (holding also that a tenant may set up a breach of a covenant to repair as a cross action or recoupment); *Long v. Gieriet*, 57 Minn. 278, 59 N. W. Rep. 194; *Watts v. Coffin*, 11 Johns. (N. Y.) 495; *Osborn v. Etheridge*, 13 Wend. (N. Y.) 339; *Arbenz v. Exley*, 52 W. Va. 476, 44 S. E. Rep. 109.

<sup>12</sup> *Maroney v. Hellings*, 110 Cal. 219, 42 Pac. Rep. 560; *Lockwood v. Lockwood*, 22 Conn. 425; *Lewis v. Chisolm*, 68 Ga. 40; *Winn v. Spearing*, 26 La. Ann. 384; *Goodfellow v. Noble*, 25 Mo. 60; *Kelsey v. Ward*, 16 Abb. Pr. (N. Y.) Rep. 98; *Newman v. French*, 45 Hun, 65; *Tibbits v. Percy*, 24 Barb. (N. Y.) 39, 43; *Van Buskirk v. Gordon*, 10 N. Y. St. Rep. 351; *Moffatt v. Smith*, 4 N. Y. 126; *Allen v. Culver*, 3 Denio (N. Y.) 284;

sor in case of fire, and a covenant by the lessee to pay rent during the erection of the new building, are dependent covenants and the lessor having failed to rebuild the premises after they have been totally destroyed by fire, cannot recover further rent.<sup>13</sup> And hence, as the party damaged by a failure to keep the agreement to repair has a complete and adequate remedy at law, an injunction will not lie to compel the party at fault to perform his covenant or agreement unless the failure to repair shall amount to voluntary waste on the part of the tenant.<sup>14</sup> The breach of a covenant to repair whether by the lessor or the lessee gives rise at once to a cause of action on the covenant and the party injured may immediately sue thereon without waiting for the termination of the lease.<sup>15</sup> And a covenant to repair is a continuing covenant for each breach of which the covenantee may sue as it occurs.<sup>16</sup>

**§ 526. Measure of damages on breach of a covenant by the lessor to repair.** The amount of damages recoverable by a lessee for a breach by the lessor of his covenant to repair is the

Nichols v. Dusenberry, 2 N. Y. 283; Slocum v. Brown, 22 Fed. Cases, No. 12, 934, 5 Cranch, C. C. 315; Young v. Burhans, 80 Wis. 438, 50 N. W. Rep. 343.

<sup>13</sup> Lincoln Trust Co. v. Nathan, 175 Mo. 32, 74 S. W. Rep. 1007. In one case it was held that a landlord might maintain assumpsit against a tenant for a failure to repair where the lease was executed under the seal of the landlord, but not under that of the tenant. First Congregational Meeting House Society v. Town of Rochester, 66 Vt. 501, 29 Atl. Rep. 810.

<sup>14</sup> Jarvis v. Henwood, 25 N. J. Eq. 460, 465, holding that the party aggrieved may repair and recover the amount he has been compelled to pay.

<sup>15</sup> Schieffelin v. Carpenter, 15 Wend. (N. Y.) 400; Mirick v. Bashford, 38 Barb. (N. Y.) 191; Webster v. Nosser, 2 Daly (N. Y.)

186; Ganson v. Tifft, 71 N. Y. 48; Buck v. Pike, 27 Vt. 529. A covenant to repair made by a lessee with several lessors owning the premises jointly is a joint covenant and the lessors must sue thereon jointly and not severally though the lessee has agreed to pay to each of the lessors separately his proportion of the rent. The action must be in the names of all the lessors jointly; Calvert v. Bradley, 16 How. (U. S.) 580, 14 Law ed. 1066.

<sup>16</sup> Block v. Ebner, 54 Ind. 544. In Louisiana the lessor cannot sue for a breach of a covenant to repair and to surrender the premises in good repair until the lease expires. No demand is then necessary according to the statute. Payne v. James, 42 La. Ann. 230, 7 So. Rep. 457. See also as to demand. Cooke v. England, 27 Md. 30, 36, 92 Am. Dec. 618.

fair and reasonable value of the material and labor used in making the repairs, or which would be necessary to be used for that purpose and the value of the use of the premises during the period, if any, the lessee was deprived of their beneficial enjoyment.<sup>17</sup> A different measure of damages is given by many of the authorities. It is held that the measure of damages for the failure of the lessor to comply with his covenant to repair is the difference between the rental value of the land in the condition of repair in which the lessor permits it to remain and its rental value in a condition of good repair from the time it should have been repaired.<sup>18</sup>

<sup>17</sup> Middlekauf v. Smith, 1 Md. 329, 343; Wisdom v. Newberry, 30 Mo. App. 241; Darwin v. Potter, 5 Denio (N. Y.) 306; Myers v. Burns, 35 N. Y. 269, 272, affirming 33 Barb. (N. Y.) 401; Flynn v. Hatton, 43 How. Pr. (N. Y.) 333, 351; Jenkins v. Stone, 12 Mont. Co. Law Rep. (Pa.) 27; Miller v. McArdell, 19 R. I. 304, 33 Atl. Rep. 445, 30 L. R. A. Under these cases the damages sustained by the breach of a covenant to repair may be proved by showing by competent witnesses the sum it will take to put the premises in the state of repair in which the covenantor ought to have kept them under the covenant and the jury may also allow the covenantee as damages compensation for his loss of the use of the premises while they are being repaired. Archbold's Landlord & Tenant, 177, 53 Law Lib. 174. Story on Contracts, 930. See, also, sustaining text, Walker v. Swayzee, 3 Abb. Pr. (N. Y.) 136. The measure of damages for a breach of a covenant by a landlord to have the necessary finishing of the building done is the cost to the tenant of doing it himself. Kimball & Co. v. Doggett, 62 Ill. App. 528. A breach of a contract

by the lessor to keep premises let as a boarding house in repair, is the rental value of the rooms which could not be rented because of lack of repair. Gulliver v. Fowler, 64 Conn. 556, 30 Atl. Rep. 852. For a breach of the lessor's covenant to clean ditches by which the lessee was prevented from making a full crop it is the amount it would have cost the tenant to put the ditches in order, and the subsequent decrease in the net yield of the land. Spencer v. Hamilton, 113 N. Car. 49, 18 S. E. Rep. 167. For breach of an agreement by a landlord to supply materials to the tenant with which the latter was to make fences the amount paid by the lessee for such material. Wood v. Sharpless, 174 Pa. St. 588, 34 Atl. Rep. 319, 38 W. N. C. 153.

<sup>18</sup> Frederick v. Daniels, 74 Conn. 710, 52 Atl. Rep. 414; Winne v. Kelley, 34 Iowa, 339, 340, 341; Biggs v. McCurley, 76 Ind. 409, 25 Atl. Rep. 466; Cooke v. Soule, 45 How. Pr. (N. Y.) 340, 56 N. Y. 420, 423; Huber v. Ryan, 67 N. Y. Supp. 972, 57 App. Div. 34; Beakes v. Holzman, 94 N. Y. Supp. 33; Cantwell v. Burke, 6 N. Y. St. Rep. 308, 25 Weekly Dig.

**§ 527. The lessor's defense.** The entry and retaining of possession of the premises by the lessee are no defense to an action by the lessee against the lessor to recover on the covenant

447; *Godfrey v. India Wharf Brewing Co.*, 87 App. Div. 123; *Saffer v. Levy*, 88 N. Y. Supp. 144; *Rogers v. Bemus*, 69 Pa. St. 432; *Jackson v. Farrell*, 6 Pa. Super. Ct. Rep. 31; *Parker v. Meadows*, 86 Tenn. 181, 186, 6 S. W. Rep. 49; *Kohne v. White*, 12 Wash. 199, 203, 40 Pac. Rep. 794; *Hinckley v. Beckwith*, 13 Wis. 31. In *Hexter v. Knox*, 63 N. Y. 561, 565, it was determined that, though the tenant may repair and then recover what it has cost him, he is not bound to do so when the failure to repair has resulted in a total or partial eviction. He may then recover the value of the use of that portion of the premises of which he has been deprived. See also *Myers v. Burns*, 35 N. Y. 269. On the breach of the lessor's covenant to rebuild in case of a total destruction of the premises, the lessee may recover what the unexpired term was worth to him under all the circumstances. *Ganson v. Tiffet*, 71 N. Y. 48; 55-58. The tenant of farm land whose crops are injured by a flood which was caused by the landlord's failure to clean ditches may recover not only what it costs him to put the ditches in repair but also for the resulting decrease in the net yield of the land. *Spencer v. Hamilton*, 113 N. Car. 49, 18 S. E. Rep. 167, 37 Am. St. Rep. 611. If by express terms the lessee has a right to repair at the lessor's expense in case the latter does not fulfill his covenant to repair, the lessee can recover only the cost of making the re-

pairs and not for his loss of the use of the premises. *Fort v. Orn-dorff*, 7 Heisk. (Tenn.) 167. And where the repairs to be made are very slight it is the duty of the tenant to repair promptly and he ought not to wait until the condition of disrepair amounts to an eviction. *Parker v. Meadows*, 86 Tenn. 181, 186. So the rule of measuring the damages for a breach of a covenant to repair has been said to be to give the tenant the difference between the actual rental value, *i. e.*, the value of the use of the premises as they are in a state of disrepair and the amount of rent reserved in the lease. *Leick v. Tritz*, 94 Iowa, 322, 62 N. W. Rep. 855; *Biggs v. McCurley*, 76 Md. 409, 25 Atl. Rep. 466; *Bostwick v. Losey*, 67 Mich. 554, 35 N. W. Rep. 246; *Parker v. Meadows*, 86 Tenn. 181, 186, 6 S. W. Rep. 49. In the ordinary case of a lease of a building to be used for any lawful purpose at the discretion of the lessee, and there has been a breach of a covenant by the lessor to repair, the rule which measures the damages by the difference in rental value, is usually compensatory, and, in most cases best satisfies the demands of justice. If in all cases it does not afford full compensation, it at least eliminates an element of speculation and uncertainty which, if permitted to be considered, would often lead to great injustice. The cases of *Myers v. Burns* (35 N. Y. 269), and *Hexter v. Knox* (63 id. 561), were cases of leases for hotel pur-

of the lessor to repair. The lessee is not bound to surrender the premises to secure the benefit of the lessor's covenants and to require him to do so would defeat the rule that covenants of this character are separate from and independent of the covenant to pay rent. An action on the covenant to repair is clearly distinguishable from an action for damages for an eviction which latter cannot be maintained unless the lessee can show that he has abandoned the possession of the premises wholly or in part.<sup>19</sup> If, however, the failure of the lessor to repair has rendered any portion of the premises unsafe and untenantable, the tenant is not bound to remain in the dangerous possession of that part of the building which is unsafe but may either repair it at the expense of the landlord or refuse to occupy it and recover for the loss of its use as in case of an eviction.<sup>20</sup> For it is

poses, and for a breach of a covenant to repair the tenant was allowed to recover the value of the use of certain rooms in the hotel for hotel purposes during the time they were rendered untenantable because of the failure to perform the covenant. By the court in *Thomson-Houston Electric Co. v. Durant Land Imp. Co.*, 144 N. Y. 34, 47, 39 N. E. Rep. 7, in which case it was agreed that the lessor should repair and that the rent should abate in the same proportion, as it should in case of damage by fire when it was to abate according to the proportion of the premises the use of which the lessee might be deprived of, and the court held that the measure of damages was in proportion, as the part of the building of which the lessee had been deprived was to the whole building, affirming 4 Misc. Rep. 207, 53 N. Y. St. Rep. 467, 3 N. Y. Supp. 900, 2 Misc. Rep. 182, 22 N. Y. Supp. 1134. The tenant cannot recover for damages to his health by exposure from the absence of repairs as these dam-

ages are too remote. *Hanson v. Cruse*, 155 Ind. 176, 57 N. E. Rep. 904. A lessor who has agreed to keep the outside of a building in repair, the tenant agreeing to repair the interior is liable to the tenant for expenses incurred in repairing the inside due to his neglect to repair the outside. *Milner v. McCardell*, 19 R. I. 304, 33 Atl. Rep. 445.

<sup>19</sup> *Thomson-Houston Electric Co. v. Durant Land Improvement Co.*, 144 N. Y. 34, 44, 39 N. E. Rep. 7, affirming 4 Misc. Rep. 40, 207, 23 N. Y. Supp. 900. See also *Lewis v. Chisolm*, 68 Ga. 40; *Reno v. Mendenhall*, 58 Ill. App. 87.

<sup>20</sup> Where in consequence of the lessor's failure to keep his covenant to repair a water mill, the mill itself became useless, the tenant is not bound to repair the mill, but is justified in abandoning it. It is an eviction and the lessee can then recover damages for the value of the use of the water mill to him. *Bostwick v. Losey*, 67 Mich. 554, 35 N. W. Rep. 246.

no defense that he has failed to make the repairs himself before he brought his action on the covenant signed by the lessor.<sup>21</sup> Nor can the lessor show as a bar to an action on the covenant to repair that the condition of the premises is due, in part, to the contributory negligence and lack of care of the lessee. He, the lessor, having expressly covenanted absolutely to repair, is obligated to do so whatever may be the cause of the dilapidation or lack of repair excepting of course, any willful waste or wanton and malicious destruction of the premises on the part of the tenant. In so far, however, as the lack of care or the negligence of the tenant has contributed to increase the damages which the tenant has received in his property, it may be considered by the jury not as a defense but in mitigation solely upon the question of damages.<sup>22</sup> For the covenantee can recover only for injuries resulting from the acts and conduct of the covenantor and not for damages which might have been prevented or avoided by the use of care on his part. But, on the other hand, it has been held in an action by a lessee against a lessor on the latter's covenant to repair, the lessor may be permitted to prove as a counter-claim that the premises were burned by the lessee's carelessness where the lessee had expressly covenanted to return them in good condition or repair at the expiration of the lease. The carelessness of the lessee is not then a tort pure and simple but is a breach of an express contract and being such may be the subject of a counterclaim.<sup>23</sup>

**§ 528. A covenant to repair—what it includes.** An express covenant to repair binds the covenantor to repair any injury to the building which it is in the power of man to remedy, even though the injury should have been caused by fire, storm, flood or lightning, inevitable accident or the act of man.<sup>24</sup> Thus, a

<sup>21</sup> *Green v. Bell*, 3 Mo. App. 291.

<sup>22</sup> *Flynn v. Trask*, 11 Allen (Mass.) 550, 554.

<sup>23</sup> *Zigler v. McClellan*, 15 Oreg. 499, 503, 16 Pac. Rep. 179.

<sup>24</sup> *Polack v. Pioche*, 35 Cal. 416, 95 Am. Dec. 115, 117; *Flynn v. Trask*, 11 Allen (Mass.) 550, 555; *Leavitt v. Fletcher*, 10 Allen (Mass.) 119, 122; *Phillips v. Stevens*, 16 Mass. 238, 240; *Bigelow v. Collomore*, 5 Cush. (Mass.) 226,

231; *Allen v. Culver*, 3 Denio (N. Y.) 284, 294; *Fowler v. Bott*, 6 Mass. 63, 68; *Lovett v. United States*, 9 Ct. Cl. 479; *Abby v. Billups*, 35 Miss. 618; *Fowler v. Payne*, 49 Miss. 32, 77; *Bullock v. Dommitt*, 6 T. R. 650; *Green v. Eales*, 2 Q. B. 225, 1 Gale & Dar. 468; *Paradine v. Jane, Aleyn*, 27, Style 47; *Compton v. Allen, Style* 162, Dyer 33a.

covenant to keep in repair the outside of the premises leased means that the covenantor must do whatever shall be needed to maintain in existence the whole outer shell or inclosure of the building, i. e., the roof and the sides of the building in complete condition but only as they were at the time of the letting.<sup>25</sup> A covenant by the tenant to keep in repair and to surrender the premises at the end of the lease in as good condition as they are at the date of the lease will, at common law, obligate the tenant to rebuild the premises in case of their total destruction by fire.<sup>26</sup> In some of the states, however, there have been enacted statutes that no agreement of a lessee that he will repair or leave the premises in repair shall have the effect of binding him to erect similar buildings if, without his fault or negligence, the same may be destroyed by fire or other casualty. The statute applies though the buildings be merely injured or partially

<sup>25</sup> Leavitt v. Fletcher, 10 Allen (Mass.) 119, 122.

<sup>26</sup> Bigelow v. Collomore, 5 Cush. (Mass.) 226, 231; Phillips v. Stevens, 16 Mass. 238, 240. See the well considered remarks of the court in this last case upon the folly of a lessee for a short term executing a lease in ignorance of its language and meaning under which, very much to his surprise and dismay, he becomes bound to replace a building which is destroyed during the tenancy by reason of a covenant binding him to repair. See also as sustaining the text. Reno v. Mendenhall, 58 Ill. App. 87; David v. Ryan, 47 Iowa, 642, 644; Hoy v. Holt, 91 Pa. St. 88, 90, 36 Am. Rep. 659; Hallett v. Wylie, 3 Johns. (N. Y.) 44, 3 Am. Dec. 457; Lynn v. Ross, 10 Ohio, 412; Myers v. Myrrell, 57 Ga. 516; McIntosh v. Lown, 49 Barb. (N. Y.) 550, 554; Redding v. Hall, 1 Bibb (Ky.) 536; Bohannon v. Lewis, 3 T. B. Mon. (Ky.) 330; Sun Ins. Office v. Varble, 46 S. W. Rep. 486, 487, 20 Ky. Law Rep. 556; Beach v. Crain, 2

N. Y. 86; Warner v. Hitchins, 5 Barb. (N. Y.) 666, 3 Black. Com. 229, 3 Kent. Com. 467, Comyn's Dig. Landlord & Tenant, 185; Brecknock v. Pritchard, 6 T. R. 750; Bullock v. Drommitt, 6 T. R. 650; Leeds v. Cheetham, 1 Sim. 146; Digby v. Atkinson, 4 Camp. 275; Schmidt v. Pettit, 8 D. C. 179, *contra*, Armstrong v. Maybee, 17 Wash. 24, 48 Pac. Rep. 737. In Paradine v. Jane, Aleyn, 27, where the lessee's defense was that he had been ousted and kept out of possession by a certain alien prince named Rupert, the court in deciding in favor of the lessor in an action for rent says: "when a party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident, by inevitable necessity, because he might have provided against it by his contract and therefore if the lessee covenant to repair a house though it be burnt by lightning or thrown down by enemies yet he ought to repair it." Dyer 33a.

destroyed by fire.<sup>27</sup> Under a covenant in a lease to keep a mill in repair, the covenantor is not bound to add improvements or make additions, but he is bound to renew existing machinery when it becomes so old and worn as not to answer its purpose. Thus, if a strap in the machinery gives way, and it was too rotten and decayed to be mended, a new one to take its place must be furnished.<sup>28</sup>

**§ 529. Covenants to repair run with the land.** The covenants of the parties to repair, to rebuild or to make improvements relating as they do to thing demised, run with the land and bind not only the covenantor and his personal representatives but also the assignee of the covenantee, though the assignee be not named and the word "assigns" be not used and every person into whose hands the land shall come whether as owner or as lessee.<sup>29</sup> The assignee of the lessee of farm land is liable to the lessor on an agreement by the lessee to clear the land and to make it ready for the plow and to build a cabin and dig a well upon the premises. This liability arises not out of privity of contract but out of privity of estate.<sup>30</sup> So, a covenant to pull down chimneys and to put up new ones

<sup>27</sup> Sun Ins. Office v. Varble, 20 Ky. Law Rep. 556, 46 S. W. Rep. 486.

<sup>28</sup> Cooke v. England, 27 Md. 14, 31. A covenant to keep in repair during the term is broken if the premises are out of repair at any time during the term. Luxmore v. Robinson, 1 B. & Ald. 584; Schieffelin v. Carpenter, 15 Wend. (N. Y.) 400; Buck v. Pike, 25 Vt. 529. In order to constitute a breach of this covenant there must be actual state of disrepair. A mere trifling omission on the part of the tenant will not constitute a breach. Thus a broken pane of glass, a defaced or scratched condition of the wall or a door hanging loose upon its hinges is not alone a breach. But an aggregation of such small defects as these may be sufficient to

constitute a breach of a covenant to repair or to leave in good repair. Leaving a quantity of rubbish in the cellar of the demised premises is not a breach of covenant to leave the premises in good repair. Thorndike v. Burrage, 111 Mass. 531.

<sup>29</sup> Mitchell v. McNeal, 4 Colo. App. 136, 34 Pac. Rep. 840; Gordon v. George, 12 Ind. 408, 410; Nelman v. Wells, 17 Wend. (N. Y.) 136; Allen v. Culver, 3 Denio (N. Y.) 284; Pastor v. Jones, 3 N. Car. 215; Shelby v. Hearne, 6 Yerg. (Tenn.) 512; Dean and Chapter of Windsor's Case, 5 Coke 24; Kingdon v. Mattle, 1 M. & S. 355; Caugham v. King, Cro. Car. 221; Laugher v. Williams, 1 Salk. 316.

<sup>30</sup> Gordon v. George, 12 Ind. 408, 409.

binds the lessee's assignee.<sup>31</sup> But an undertenant who covenants with his lessor to repair is not bound by a covenant to repair made by his lessor long before the undertenant took possession.<sup>32</sup> The personal covenant of a lessor to rebuild the premises if they are destroyed by fire is binding on his executor,<sup>33</sup> though the executor be not mentioned in it. And the lessee who has the right to have repairs made at the expense of the lessor may enforce that right against the grantee of the lessor.<sup>34</sup> But a covenant by a lessor "for himself and his heirs at his and their cost," to keep premises in repair, does not bind the executor of the lessor, and the latter will not be liable to make repairs after the death of the lessor.<sup>35</sup> So, an agreement by the landlord, not that he is to repair himself, but that he will pay the tenant for all necessary repairs he may make, is his personal agreement, and does not bind his grantee.<sup>36</sup>

**§ 530. The construction of a covenant to keep in repair by a tenant.** The tenant's covenant "to keep" leased premises in repair during the term imposes upon him an obligation to keep them in as good repair as when the covenant was made. The covenant to repair is therefore identical in its meaning with a covenant "to keep in as good repair as the premises now are." The tenant therefore is not bound by a covenant to keep in repair, to renovate and to improve a building which is old and dilapidated at the date he enters into possession of the premises or to return it to the lessor at the end of the term in any better condition than it was at the date he received it.<sup>37</sup> In

<sup>31</sup> *Harris v. Goslin*, 3 Har. (Del.) 338.

<sup>32</sup> *St. Joseph & St. L. R. Co. v. St. Louis I. M. & S. Ry. Co.*, 135 Mo. 173, 36 S. W. Rep. 602, 33 L. R. A. 607.

<sup>33</sup> *Chamberlain v. Dunlop*, 126 N. Y. 45, 36 N. Y. St. Rep. 373, 26 N. E. Rep. 966, affirming 8 N. Y. Supp. 125.

<sup>34</sup> *Mitchell v. McNeal*, 4 Colo. App. 136, 34 Pac. Rep. 840.

<sup>35</sup> *Kershaw v. Supplee*, 1 Rawle (Pa.) 131.

<sup>36</sup> *Willcox v. Kehoe*, 124 Ga. 484, 52 S. E. Rep. 896.

<sup>37</sup> *Middlekauff v. Smith*, 1 Md. 329; *Stultz v. Locke*, 47 Md. 562; *St. Joseph & St. L. R. Co. v. St. Louis I. M. & S. Ry. Co.*, 135 Mo. 173, 197, 36 S. W. Rep. 602, 33 L. R. A. 607; *Gutteridge v. Munyard*, 7 Car. & Payne. 129; *Martinez v. Thompson*, 80 Tex. 568, 16 S. W. Rep. 334. A covenant to keep fences in repair during the tenant's occupancy, binds him to rebuild them when they are destroyed. *Spafford v. Meagley*, 1 Ohio Dec. 364, 8 Jo. 323.

construing a covenant to repair the age and general condition of the premises must be considered. On a covenant to maintain premises in good repair the lessee is bound to keep buildings *in situ* and in as good condition as when he entered and to repair them if ruinous, or so as to replace them as nearly as might be in the position in which they were when demised and he is liable when he pulls them down, for their value as they stood, without reference to the result of their removal as regards the general improvement of the farm on which they stood.<sup>38</sup> Under an agreement to keep a house in "good tenantable repair" and to leave the same at the expiration of the term, the tenant's obligation is to put and keep the premises in such repair as, having regard to the age, character and locality of the house would make it reasonably fit for the occupation of the class who would be likely to take it.<sup>39</sup> An agreement by a tenant to put the property "in perfectly good repair" binds him to put it in as good condition as can be done without any change in its form. No particular materials need be used by the tenant. He may use any materials in making repairs provided he shall put the property in such a condition as would in the opinion of persons experienced in such matters, be presumed to be perfectly good.<sup>40</sup> And it is very likely, in view of the inability of the human race to attain perfection in any direction, that the courts in construing a covenant to put in perfect repair, will give the word a reasonable interpretation and will be satisfied if the premises are put in fair repair according to the circumstances. An agreement by a tenant to make all repairs during the term which may be made necessary either by him or his employees, or which may be necessary to preserve the property in good order and condition binds him to make such repairs only as are rendered necessary by his own acts or the acts of his employees.<sup>41</sup> The tenant is not excused from the performance of his covenant to repair by the existence of latent defects in the premises of which he had no knowledge. A tenant who covenants to keep

<sup>38</sup> Woolcock v. Dew, 1 F. & F. 337.

<sup>40</sup> Ardesco Oil Co. v. Richardson, 63 Pa. St. 162, 165.

<sup>39</sup> Proudfoot v. Hart, 59 L. J. Q. B. D. 43, 63 L. T. 171, 38 W. R. 730.

<sup>41</sup> Levine v. Baldwin, 87 App. Div. 150, 84 N. Y. Supp. 92.

in repair certain machinery which is a part of the demised premises and at the termination of the lease to return the machinery to the landlord in good repair, is bound to do so, though there may have been some defects latent in the machinery when he took possession of it. In the absence of fraud or concealment on the part of the lessor in procuring the execution of the lease the lessee is not released from the performance of his covenant to repair the premises or to return the premises in good condition by the existence of latent defects existing in the premises if the lessor has not misrepresented their condition.<sup>42</sup> The term "habitable repair" means a state of repair reasonably fit for occupation as an inhabitant. If the premises are out of repair when the tenant receives them, he must perhaps put them in a better condition. The state of the premises when the tenant receives them, their situation and the class of persons likely to use them are all to be considered by the court in determining what is meant by the agreement by the tenant to put the premises in habitable repair.<sup>43</sup> In construing a covenant to repair, regard must be had for the age and character of the premises at the date of the lease and if the premises through their own defects fall in the course of the tenancy, into a particular condition, the result of their being in that condition is not a breach of a covenant to repair.<sup>44</sup> A general covenant by a tenant to repair and maintain a house requires him to paint the inside of it.<sup>45</sup> He need not, however, do decorative painting or papering. His covenant to keep or leave a house in repair requires him to paint

<sup>42</sup> Simkins v. Cardele Compress Co., 113 Ga. 1050, 39 S. E. Rep. 407. "The word 'repair' means to renew or to restore an existing thing, and not to make a new one. A covenant to repair ordinarily does not bind the landlord to rebuild, though there are cases in which the word 'repair,' aided by the context has been held to mean 'rebuild.' Where the contract requires the tenant to keep the premises in repair and return them in the same condition as when received, or other language

is employed showing an intention to make either party rebuild such duty will be imposed though the word 'rebuild' is not used." Gavan v. Norcross, 117 Ga. 356, 43 S. E. Rep. 771.

<sup>43</sup> Belcher v. McIntosh, 8 Car. & P. 720, 2 M. & Rob. 186.

<sup>44</sup> Lister v. Lane, 62 L. J. Q. B. 583, (1893) 2 Q. B. 212, 4 R. 474, 69 L. T. 176, 41 W. R. 626, 57 J. P. 725.

<sup>45</sup> Mark v. Noyes, 1 Car. & P. 265.

the wood work sufficiently to preserve it and the landlord may recover damages against him for his failure to do so.<sup>46</sup> A covenant by a tenant to make inside repairs while it does not by implication compel the landlord to make outside repairs, exempts the tenant from any liability for damages which result from a failure to make outside repairs. The tenant's covenant to repair the exterior parts of a building, or to make outside repairs, includes all those portions of the building which enclose it, whether at the front or back or at the sides and also the roof. Under such a covenant the tenant is bound to repair a side wall of the house which is rendered insecure and which finally falls down because the house next door is pulled down.<sup>47</sup> The tenant's covenant to repair is usually confined in its operation to the maintenance of a building in its existing condition. It does not mean that he shall make the building better than it was but only that he shall replace such portions as are worn out. Thus, under such a covenant a tenant must replace boards in the floor when they are worn out, though he is not necessarily bound to use a new method for putting in such boards by which the new floor will be more durable than the old one.<sup>48</sup> In the absence of an agreement to repair, a tenant is not bound to rebuild premises which have become ruinous, or which are accidentally destroyed by fire. He is not liable for ordinary wear and tear. He must, however, treat the premises with ordinary care so that no substantial injury thereto shall be caused by his negligence or willful misconduct.<sup>49</sup> A tenant who agrees to take a lease, to pay rent under it and that he would from time to time during the term make repairs is bound to repair under his agreement, to do so when he enters on possession and continues in possession during the whole term for which he has contracted to take a lease, though no lease was ever executed by him or the landlord.<sup>50</sup> A covenant by the tenant to repair buildings to be erected on the premises binds him to repair a building erected by the landlord on waste land adjoining the premises, but not

<sup>46</sup> Crawford v. Newton, 36 W. R. 54.

<sup>49</sup> Junction Min. Co. v. Springfield Junction Coal Co., 122 Ill. App. 574, judgment affirmed, 222 Ill. 600, 78 N. E. Rep. 902.

<sup>47</sup> Green v. Eales, 2 Q. B. 225, 1 G. & D. 408, 11 L. J. Q. B. 63,

<sup>50</sup> Pistor v. Cator, 9 M. & W. 315, 12 L. J. Ex. 129.

6 Jur. 436.

<sup>48</sup> Soward v. Leggett, 7 Car. & P. 613.

included in it, where the tenant entered upon and actually occupied the building.<sup>51</sup> A covenant to repair to the satisfaction of the landlord or of his agent means to their reasonable satisfaction and if the jury think the lessor or his agent ought to be satisfied with the repairs, it will be sufficient and there will be no forfeiture.<sup>52</sup>

**§ 531. Notice by the landlord to the tenant to repair.** In the absence of an express provision in the lease that the landlord shall give his tenant notice of the necessity for repair, the fact that the landlord does not expressly notify his tenant to repair does not exempt the latter from the consequences of his breach of his covenant to repair. The presence of the tenant on the premises and his continued occupation of them creates a presumption that he is familiar with their condition and knows when repairs are necessary. As a general rule the giving of a notice by the landlord to the tenant that repairs are necessary where such notice is not required does not waive any rights on the part of the landlord. Thus, a notice by the landlord to repair forthwith or a notice by him to repair without specifying any time does not waive the benefit of a provision in the lease that the landlord may enter and recover possession of the premises on a breach of a covenant to repair. Nor does the fact that it is also provided that the lessor may enter if the lessee fails to repair within three months after notice, deprive him of his rights under the general covenant to repair or give the lessee three months after the service of the no-

<sup>51</sup> White v. Wakley, 26 Beav. 17, 28 L. J. Ch. 77, 4 Jur. (N. S.) 988, 6 W. R. 791.

<sup>52</sup> Doe d. Baker v. Jones, 2 Car. & K. 743. It is not meant by such a covenant in fact, that the old building is to be restored in a renewed form at the end of the term so as to make the value of it greater than at the commencement of the term. Diminution in value, resulting from the natural operation of time and the elements, falls upon the landlord; but the tenant must take care that

the premises do not suffer more damages than the operation of these causes will effect, and he is bound, by all reasonable applications of labor, to keep the house as nearly as possible in the same condition as when it was demised. Gutteridge v. Munyard, 1 Mon. & Rob. 236. See also Stanley v. Two-good, 3 Bing. N. C. 4; Mantz v. Goring, 4 Bing. N. C. 451; Harris v. Jones, 1 Moo. & R. 173; Payne v. Haine, 16 Mee. & Wel. 541; Easton v. Pratt, 2 H. & C.; Richardson v. Giffard, 1 Ad. & El. 52.

tice within which to repair.<sup>53</sup> Where by the lease the lessee is entitled to three months' notice to repair, a forfeiture may be compelled before the three months has expired,<sup>54</sup> if the lessee expressly refuses to repair. But the acceptance of rent which accrued prior to the giving of the notice is a waiver of the breach of the covenant to repair,<sup>55</sup> though the acceptance of rent subsequently accruing is not a waiver. If, after having given the tenant notice to repair, the landlord does anything in connection with the premises which would render it inequitable for him to enforce, a forfeiture which will follow from the tenant's refusal to repair, the notice may be wholly disregarded. Or the effect of the notice may be temporarily suspended where such action will result in no injury to the parties. So, when after giving a notice to the lessee to repair, the latter offers to sell his interest in the premises and negotiations take place, the effect of the notice is suspended until the negotiation has come to an end, from which event the period of notice must be counted and under such circumstances equity will relieve against an ejectment which is based on the original notice.<sup>56</sup> The requirements of the lease as to the character and form of the notice must be strictly followed by the landlord. The giving of the notice is a condition precedent to the landlord suing the tenant for a breach of his covenant to repair. When a notice is required, it must be given for the knowledge of the tenant that repairs are required is not a substitute for the required notice. If a notice to him by the landlord is required by the lease, the notice need not particularly state the extent of the repairs required, as the tenant will be presumed to know this, or he will be bound to ascertain it by reason of his having entered into an agreement to repair in the lease signed by him.<sup>57</sup> The notice must come to the tenant from the person with whom he has covenanted to repair. A notice from a stranger is invalid. Thus, the undertenant's covenant to repair on notice can only be enforced against him where he receives notice from his landlord

<sup>53</sup> Few v. Perkins, 36 L. J. Ex. 54, L. R. 2 Ex. 92, 16 L. T. 62, 15 W. R. 713.

<sup>54</sup> Roe d. Goatly v. Paine, 2 Camp. 520.

<sup>55</sup> Cronin v. Rogers, 1 Cob. & E. 348.

<sup>56</sup> Hughes v. Metropolitan R'y, 46 L. J. C. P. 583, 2 App. Cas. 439, 36 L. T. 932, 25 W. R. 680.

<sup>57</sup> Foss v. Stanton, 76 Vt. 365, 57 Atl. Rep. 942.

only.<sup>58</sup> Where a tenant has covenanted in general terms to repair and also to repair on notice, it may be necessary to determine whether these covenants are independent or whether it is one entire covenant in order to ascertain whether there has been a forfeiture of which the landlord can take advantage. The question is only to be determined by a construction of the language used in each particular case. A general covenant to repair and further to repair within three months after notice are separate and independent covenants.<sup>59</sup> But a general covenant to repair at all times and at farthest within three months after notice is one entire covenant.<sup>60</sup> So, generally, the landlord must show he has performed all conditions precedent on his part in order to hold the tenant liable on his covenant to repair. A tenant who agrees that he will expend a certain sum of money in improving and repairing the premises under the direction of a surveyor or architect to be appointed by the landlord is not liable for a breach of covenant where it appears that no architect was appointed. The appointment of the architect by the landlord is a condition precedent to the liability of the tenant on his covenant to make improvements and repairs.<sup>61</sup>

**§ 532. The extent of the tenant's express obligation to repair.** A covenant by the tenant to repair, the "buildings demised" binds the tenant to repair such buildings only as are standing at the time of the execution of the lease and does not apply to buildings subsequently erected on the premises.<sup>62</sup> It is different where the tenant agrees to repair all buildings erected and built or to be erected and build. In such latter case the tenant is bound to repair all buildings that may be at any time upon the land.<sup>63</sup> But where a tenant agrees to build a certain number of houses, and during the term to keep in repair such houses so agreed to be built and he builds a greater number of houses than he has agreed to build, he will not be liable to

<sup>58</sup> Williams v. Williams, 43 L. J. C. P. 382, L. R. 9 C. P. 659, 30 L. T. 638, 22 W. R. 706.

<sup>59</sup> Baylis v. Le Gros, 4 C. B. (N. S.) 537, 4 Jur. (N. S.) 513.

<sup>60</sup> Horsfall v. Testar, 1 Moore. 89, 7 Taunt. 385.

<sup>61</sup> Coombe v. Greene, 2 D. (N.

S.) 1023, 10 M. & W. 480, 12 L. J. Ex. 291.

<sup>62</sup> Cornish v. Cleife, 11 L. T. 606, 3 H. & C. 446, 34 L. J. Ex. 19, 13 W. R. 389; Trustees of Worcester School v. Rowlands, 9 C. & P. 734.

<sup>63</sup> Hudson v. Williams, 39 L. T. 632.

keep the excess in repair.<sup>64</sup> A covenant by the lessee to build a number of houses within five years, to keep them in repair and to deliver them at the end of the term in good repair, is waived by the lessor accepting rent for forty-six years, during which time the lessee neglects to build the houses. The covenant to deliver up in good repair applies to the additional houses, as well as to those in existence at the date of the lease.<sup>65</sup>

**§ 533. The tenant's covenant to return premises in condition as he received them.** A tenant who covenants that he will keep the premises in good repair, and that he will deliver them to the landlord at the end of the term in as good condition as when he received them is bound by this covenant to rebuild the premises in case they are destroyed by fire or otherwise during the term.<sup>66</sup> A lessee who agreed to keep the premises in repair, may be compelled to rebuild in case of a total destruction by fire, though subsequent to the execution of the lease, the fire limit of the city in which the property is situated, are so extended that in re-building, the lessee must build a more expensive structure than that burned.<sup>67</sup> A covenant by the lessee to deliver up the premises at the end of the term in good order and condition, natural wear and tear excepted, must be construed by the court keeping in view the circumstances of the parties, the character and surroundings of the demised premises and the use to which they are to be put by the tenant. Thus in the case of a lease of a vacant lot to which is attached a right of collecting wharfage and the principal if not the sole use and value of which consist in having a landing on the lot for vessels plying on the river or other stream, a so-called lease is more in the nature of a franchise than it is an instrument actually conveying seizin and possession of land. So, the covenant to repair and return in good condition means only that the lessee shall return the premises in their usual condition for use-

<sup>64</sup> Dowse v. Cole, 2 Vent. 126; Dowse v. Earle, 3 Lev. 253.

<sup>65</sup> Nouaille v. Flight, 7 Beav. 521, 13 L. J. Ch. 414, 8 Jur. 838.

<sup>66</sup> Schmidt v. Pettit, 1 MacArthur, 179, 8 D. C. 179; Meyers v. Merrell, 57 Ga. 516, 520; Nave v. Berry, 22 Ala. 382; Phillips v. Stevens, 16 Mass. 238; Patterson

v. Ackerson, 1 Edw. Ch. (N. Y.) 96, 97; Hallett v. Wylie, 3 Johns. (N. Y.) 44, 3 Am. Dec. 457; Hoy v. Holt, 91 Pa. St. 88; Abby v. Billups, 35 Miss. 618, 632, 72 Am. Dec. 143. *Contra*, Warren v. Wagner, 75 Ala. 188, 51 Am. Rep. 446.

<sup>67</sup> David v. Ryan, 47 Iowa, 642; Harris v. Heackman, 62 Iowa, 411.

fullness as against ordinary influences produced by the current of the stream abrading the banks or displacing the appliances used upon the premises. The lessee is not bound to repair damages caused by an unusual flood which washed away a portion of the land itself and which could not have been prevented by human effort or remedied after it happened without the expenditure of large sums of money which greatly exceeded the value of the land itself.<sup>68</sup> An agreement to keep and surrender the premises in as good state and condition as reasonable use and wear thereof will permit, binds the tenant not only to keep the premises in as good repair as when he entered, but to leave them in good repair according to their age and condition when he took possession.<sup>69</sup> An agreement by a tenant of a farm to keep the premises in as good repair as when taken, does not bind him to keep them in such reasonable repair as farmers of ordinary prudence would do. He is bound to keep them in such repair only as when they were taken.<sup>69a</sup> He is not bound to put the premises in an improved condition by restoring dilapidations which existed when he entered. A covenant by the tenant to keep and deliver up premises in good repair has been held to bind him to put them in good repair as old premises, if at the time of the demise they were in bad repair.<sup>70</sup> If he neglects to do as he might do, covenant to keep them in the state in which he finds them, he cannot, having agreed to keep in good repair, permit them to remain in bad repair, because they happened to be in that condition when he took them. But the age and condition of the building with its character and its general condition as to repair may be considered in order to measure the extent of the tenant's liability.<sup>71</sup> Thus, where a very old building

<sup>68</sup> Waite v. O'Neil, 72 Fed. Rep. 348, 357, 22 C. C. A. 248.

<sup>69</sup> Lehmaier v. Jones, 91 N. Y. S. Rep. 687; Clark & Stevens v. Gerke (Md. 1906), 65 Atl. Rep. 326. An agreement by a tenant of a farm to keep the premises in as good repair as when taken, does not bind him to keep them in such reasonable repair as farmers of ordinary prudence would do. He is bound to keep them in such

repair only as they were when taken. Vincent v. Crane, 10 Detroit Leg. N. 653, 97 N. W. Rep. 34.

<sup>70</sup> Payne v. Haine, 16 M. & W. 541, 16 L. J. Ex. 130.

<sup>71</sup> Stanley v. Towgood, 3 Bing. N. C. 4; Burdett v. Withers, 7 A. & E. 136, 2 N. & P. 122, 6 L. J. K. B. 218, 1 Jur. 514; Harris v. Jones, 1 Moo. & R. 173 (per Tindal C. J.); Gutteridge v. Munyard, 1 Moo. & R. 334, 336, 7 Car. & P.

is let to a tenant, who agrees to repair and keep in repair simply, he is not bound to restore it at the end of the term in new condition. Nor is he bound to repair it to such an extent that it shall be of greater value at the end than it was at the beginning of the term. So far as the condition of the building is affected by the natural operation of time, or of necessary wear and tear, the loss falls on the landlord. If the tenant keeps the building in as nearly the same condition as when he received it, he will have done all he agreed to do; the courts will not hold him strictly to account if he has neglected minor details in repairing. It will thus be seen that the liability of a tenant who agrees to repair and one who agrees to put in good repair is substantially different, but in any event neither covenant binds the covenantor to replace old premises with new ones, but only to keep them in tenantable repair with reference to the purpose with which they are used. For the term good repair or simply repair must always be construed with reference to the subject matter, and its meaning must differ accordingly, as the premises demised shall be a mansion or a cottage.<sup>72</sup> The covenantor will be bound to keep the building in as good a state as it was when the lease was made, to make good all deteriorations arising from natural decay and all injuries from inevitable accident but he is not bound to do more. The covenant to repair does not bind the covenantor to put an old house in an improved state, or to avert the consequences of injuries by the elements but only to keep it in the state it was at the time of the lease by the timely expenditure of money and care.<sup>73</sup> Where a lessee has broken his covenant to repair, to keep buildings in repair, or to leave them in good repair, or in good order and condition which is the same thing, the measure of the lessor's damages for the breach is the reasonable expense of putting the premises in the state of repair or in the general condition in which

129; *Appleton v. Marx*, 102 N. Y. Supp. 2.

<sup>72</sup> Where a lessee covenants to keep old premises in repair, his obligation is to first put them in reasonable repair, and then to keep them so; particularly if the defects are open to observation,

and where there has been no fraudulent representation or concealment by the lessor at the time of making the contract. *Keroes v. Richards*, 28 App. D. C. 310.

<sup>73</sup> *Middlekauff v. Smith*, 1 Md. 329, 341; *Brown v. Trumper*, 26 Beav. 11

by the lease the lessee was bound to leave the premises.<sup>74</sup> This rule is not altered by the fact that the lessor, before the expiration of the term, leased the premises to a third person who has covenanted to alter and rebuild the premises.<sup>75</sup> He may still pursue his remedy against his delinquent tenant. A distinction is made, however, between an agreement "to deliver up" simply at the end of the term and an agreement "to repair and deliver up" or "to deliver up in as good condition as received." The former agreement merely binds the tenant not to hold over at the end of the term, and, where nothing more is said, does not bind him to rebuild premises destroyed during the term without negligence on his part; though it is perfectly obvious that if the premises are destroyed he cannot deliver up what on his entry under the lease he received from his landlord. On the other hand, a covenant to repair and to deliver up in good condition, obligates a tenant to rebuild in case of the destruction of the premises during the term.<sup>76</sup> An exception of "damages by the elements,"<sup>77</sup> or "unavoidable casualty or accident" in a covenant by the tenant to deliver up the premises in the condition as received by him, controls and nullifies the covenant; and the lessee is then not compelled to rebuild in case of a destruction of the leased premises.<sup>78</sup> So, also, an exception of "wear and tear" in a covenant by the lessee to "deliver up the premises in as good condition as he found them," exempts him from all liability to rebuild where the premises are destroyed by collapsing from inherent defects, while they were being used by him in a reasonable and proper manner and for the purpose for which he had rented them.<sup>79</sup> So, also, the absence of an express covenant to repair the premises by the tenant may have some weight in

<sup>74</sup> Willoughby v. Atkinson Furnishing Co., 93 Me. 185, 44 Atl. Rep. 612; Scott v. Haverstraw Clay & Brick Co., 62 Hun, 620, 16 N. Y. Supp. 670; Joyner v. Weeks (1891), 2 Q. B. 31.

<sup>75</sup> Joyner v. Weeks (1891), 2 Q. B. 31. See also Davenport v. United States, 26 Ct. Cl. 338.

<sup>76</sup> Nave v. Berry, 22 Ala. 382, 391; Phillips v. Stevens, 16 Mass.

238; Warner v. Hitchins, 5 Barb. (N. Y.) 666; Maggott v. Hansbarger, 8 Leigh (Va.) 532.

<sup>77</sup> Allen v. Culver, 3 Denio (N. Y.) 284.

<sup>78</sup> Howeth v. Anderson, 25 Tex. 557, 78 Am. Dec. 538. "Unavoidable accidents and wear and tear excepted."

<sup>79</sup> Hess v. Newcomer, 7 Md. 325.

determining the effect of the tenant's covenant to deliver the premises up in as good condition as when received by him. Thus it has been held that in the absence of an express covenant to rebuild in case of a total destruction of the premises, or of any covenant to repair, a mere agreement to return a mill "in good running order," wear and tear excepted,<sup>80</sup> or to deliver premises "in as good condition as when delivered,"<sup>81</sup> does not bind the lessee to rebuild in case of a destruction by fire which was not produced by his own negligence.<sup>82</sup> Where a tenant surrenders possession at the expiration of the term without fulfilling his covenant to surrender the premises in as good condition as they were at the date of the lease, the landlord may either sue at once for damages to the reversion or he may repair the premises and then sue to recover the costs of such repairs from the tenant.<sup>83</sup> Where the tenant has agreed to place the premises in the condition at the expiration of the term in which they were at its commencement if required to do so by the landlord, the latter may serve notice to restore the premises to their original condition within a reasonable time from the expiration of the lease.<sup>84</sup>

<sup>80</sup> Levey v. Dyess, 51 Miss. 501.

<sup>81</sup> Miller v. Morris, 55 Tex. 412, 40 Am. Rep. 814, where the covenant was to restore premises "in as good condition as when delivered to them, that is to say, in good running order, ordinary wear and tear excepted."

<sup>82</sup> A covenant to repair by a tenant will not be implied from his covenant to "quit and surrender premises \* \* \* in as good state and condition as reasonable wear and tear will permit, damages by the elements excepted." A tenant is not liable under such a covenant because the premises, which consisted of wharf or dock property on a navigable river is injured by the municipal authorities establishing a new dock on account of which they necessarily had to take down

a portion of the demised premises. Nor is this permissive waste where the tenant took all legal methods by an injunction to prevent the destruction of the property. Beekman v. Van Dolsen, 63 Hun (N. Y.) 487, 496, 18 N. Y. Supp. 376.

<sup>83</sup> Darlington v. DeWald, 194 Pa. St. 305, 45 Atl. Rep. 57.

<sup>84</sup> Reed v. Harrison, 196 Pa. St. 337, 46 Atl. Rep. 415. A covenant by a tenant in a lease of a quarry that he will remove all rubbish and spawls and return the same "in as good condition as it now is," binds him to remove only such rubbish and spawls as may accumulate during the term. To require him to remove rubbish left on the premises by his predecessor would be equivalent to compelling him to leave the premises

§ 534. When an action on a covenant to surrender in good condition or good repair accrues. A tenant who has agreed to make certain improvements in the premises, has until the end of the term to make them, in the absence of an express agreement fixing an earlier date and his statement during the term that he will not have the improvements made, is not a breach of the contract.<sup>85</sup> A covenant forthwith to put the premises in complete repair must receive a reasonable construction, and is not to be limited to any specific time, it is a question for the jury whether the covenantor has done what he ought reasonably to have done in performing it.<sup>86</sup> There is a distinction as to the date a cause of action accrues between covenants to repair and to keep in repair on the one hand and covenants to surrender in good repair or in the same condition as received on the other. A covenant by the lessee to repair or to keep in repair binds the lessee to keep the premises in good repair at any time during the term and if they are out of repair at any time during the term, the lessor may, upon such a breach, sue for the damage caused thereby to the reversion.<sup>87</sup> A covenant to surrender in good condition and repair at the end of the term means quite a

in a better condition than it was when he entered. *Coppinger v. Armstrong*, 49 Mo. App. 8 Ill. App. 210, 213. Where premises were leased under several successive leases, each of which was executed before the prior existing lease had terminated and each of which contained a covenant by the lessee to return the premises "in the same condition as they were at the execution" thereof the lessor on an action on this covenant is not bound to show the actual condition of the premises at the end of each lease but may prove a breach of this covenant referable to any one of them, or to all of them. The surrender and delivery of the premises by the lessee to the lessor at the end of the lease are technical and constructive merely and not a

waiver by the lessor of any of his rights on a covenant. The surrounding circumstances and particularly the renewal must be considered, together with the fact that the lessor had neither opportunity nor occasion to protest. The several leases in fact constitute but one continuous term and the lessor, on the termination of the last lease, is not estopped to recover for a breach under any of them. *McGregor v. Board of Education of City of New York*, 107 N. Y. 511, 517, 14 N. E. Rep. 420.

<sup>85</sup> *Palethorp v. Bergner*, 52 Pa. St. 149, 23 L. I. 140.

<sup>86</sup> *Doe d. Pittman v. Sutton*, 9 Car. & P. 706.

<sup>87</sup> *Snowhill v. Reed*, 49 N. J. Law 292, 298, 10 Atl. Rep. 737, 60 Am. Rep. 615; *Luxmore v. Robinson*, 1 B. & Ald. 584, 19 R. R. 396.

different thing. There can be no breach of such a covenant until the term is ended, for the covenantor has the whole term to repair. Hence, where a lessee covenants to leave the premises in good repair and condition at the end of the term or in the same condition then as they were at the execution of the lease or at the beginning of the term, no cause of action accrues to his lessor until the expiration of the term. The fact that the premises are out of repair at any time during the term gives no right of immediate action as repairs may be made thereafter and the premises restored to good condition before the end of the term.<sup>88</sup> The question what is meant by the words "expiration of the term" may arise where the lease is surrendered before the term has expired by the lapse of time. Unquestionably the parties to such a covenant "by expiration of the term" mean in most cases that no cause of action shall accrue until the end of the full term caused by the natural efflux of time. But a lease may expire in many other ways than by lapse of time as for example, by the taking of the premises for public uses, by certain wrongful acts of the tenant by surrender or by eviction. And where the term thus expires, it is as much at an end as if it had expired by the lapse of time. Neither party can thereafter obtain any rights under it though either may enforce against the other any rights or obligations which may have accrued theretofore. Hence, where a lease is surrendered during the term by the agreement of the parties, a cause of action on a covenant to surrender in good condition at the expiration of the term at once accrues to the lessor and if the premises are not returned in good condition at the time of the surrender, the lessor may sue at once for damages.<sup>89</sup>

<sup>88</sup> Fratt v. Hunt, 108 Cal. 288, 41 Pac. Rep. 12; Schieffelin v. Carpenter, 15 Wend. (N. Y.) 400; Rosenbloom v. Finch, 76 N. Y. Supp. 902; Gulf C. & S. F. Ry. Co. v. Settegast, 79 Tex. 256, 15 S. W. Rep. 228; Knutsen v. Cinque, 99 N. Y. Supp 910.

<sup>89</sup> Marshall v. Rugg, 6 Wyo. 270, 290, 44 Pac. Rep. 700, 45 Pac. Rep. 780, 33 L. R. A. 679, distinguishing Reed v. Snowhill, 51 N. J. Law 162, 16 Atl. Rep. 679,

which is *contra* and which reversed Snowhill v. Reed, 49 N. J. Law 292, 10 Atl. Rep. 737, 60 Am. Rep. 615, where a lease provided that the lessees should restore the demised premises to their original condition at the expiration of the term if required by the lessor, but specified no time when he should give notice of such requirement, the lessor's failure to give such notice until three weeks after the expiration

**§ 535. The exception of ordinary or natural wear and tear.** The exception of ordinary wear and tear in a covenant by the lessee to repair the premises, or to deliver them to the lessor at the end of the term in the same condition or in the repair in which the lessee received them, covers the destruction of the premises by fire or by their falling down during the term by reason of some defect in them, provided that at the time of the loss or destruction the lessee was using the premises in an ordinary and reasonable manner according to the intention of the parties and the purposes for which they were leased.<sup>90</sup> It is usually a question for the jury in the case of the exception of wear and tear to determine whether there has been a reasonable use of the premises. The burden of showing that repairs made by the tenant come within the exception of reasonable use and wear and damage by elements is upon the tenant<sup>91</sup> and if he does not show this he cannot recover from his landlord for his repairs.<sup>92</sup> It is a general rule that a covenant to return premises in good condition or in as good condition as they were at the commencement of the term, natural wear and tear excepted, requires the tenant to make only ordinary repairs and not extraordinary repairs, necessary because of injury to or destruction of the premises.<sup>93</sup> Thus, the destruction of the property by fire is within the exception of usual or ordinary wear or tear and in the absence of negligence on the part of the tenant he is not bound to rebuild or repair the property though he may have agreed to deliver the premises in good condition at the end of the term.<sup>94</sup>

of the term did not relieve the lessees from their obligation to restore the premises to their original condition. *Reed v. Harrison*, 196 Pa. St. 337, 46 Atl. Rep. 415..

<sup>90</sup> *Machen v. Hooper*, 73 Md. 342, 369, 21 Atl. Rep. 67; *Hess v. Newcomer*, 7 Md. 325, 337.

<sup>91</sup> *Hovey v. Walker*, 90 Mich. 527, 51 N. W. Rep. 678.

<sup>92</sup> *McGregor v. Board of Education*, 107 N. Y. 511, 14 N. E. Rep. 420.

<sup>93</sup> *Weil v. Gilchrist*, 52 Ohio St. 677, 44 N. E. Rep. 1150, affirm-

ing *Gilchrist v. Weil*, 10 Ohio Dec. 687, 8 Ohio N. P. Rep. 647.

<sup>94</sup> *Levey v. Dyess*, 51 Miss. 501. In *Hess v. Newcomer*, 7 Md. 325, on P. 337, the court said: "Although when a lease contains no express contract of warranty that the property is or shall be fit for the purpose for which it may be rented, there is no implied warranty to that effect, and in case the property falls down in consequence of some inherent defect, the lessor is not bound to repair, and yet the lessee will be com-

§ 536. The construction of the phrase damages by the elements. The expression "excepting damages by the elements" is common in covenants to repair contained in leases. This is usually regarded as synonymous with the expression "act of God."<sup>95</sup> This latter expression, "act of God," is employed not only in leases but in many other classes of written contracts, such, for example, as insurance policies, bills of lading, charter parties, etc. Very many attempts have been made to define it, but perfect accuracy has not been reached.<sup>96</sup> According to Lord Mansfield, the "act of God" means some natural necessity which could not have been occasioned by the intervention of man, but which proceeds from physical causes alone, such as the violence of the winds, or seas, lightning, or other natural accident.<sup>97</sup> As examples of what has been considered the "act of God" in the legal sense in relation to leases of real property

pepled to pay the rent; nevertheless the lessee will not be bound to repair in such a case if there be a covenant to repair and to return the property in the same condition he received it, natural wear and tear expected; provided that at the time of the loss, the lessee was using the property in a reasonable and suitable manner, according to the object and design of the parties when the contract was made. If a man rents a house for a particular purpose, and that is known to both parties, the lessee usually has the right to use it for such purpose, provided he does so with a reasonable degree of prudence and care. And if during such use the house tumbles down in consequence of some defect in its structure, does not the loss rise from wear and tear? The defect is a part of the nature of the building, and if that nature is the cause of the mischief, the loss is necessarily the consequence of natural wear and tear."

<sup>95</sup> Pollack v. Pioche, 35 Cal. 416, 95 Am. Dec. 115, 117.

<sup>96</sup> Ewart v. Street, 2 Bailey (S. Car.) 157, 23 Am. Dec. 132.

<sup>97</sup> Proprietors, etc. v. Wood, 3 Esp. 127, and in Forward v. Pittard, 1 T. R. 27, on the same says: "Now what is the 'act of God?' I consider it to mean something in opposition to the act of man; for everything is the act of God that happens by His permission; everything by His knowledge; \* \* \* such acts as could not happen by the intervention of man, as storms, lightnings and tempests." The court in Fergusson v. Brent, 12 Md. 9, 71 Am. Dec. 582, says in commenting on this: "this definition is about as accurate and specific as, perhaps, any that could be given. It excludes all circumstances produced by human agency, so that if divers causes concur in the loss, the act of God being one, but not the proximate cause, it does not discharge the carrier. To relieve him, the act of God must be the immediate cause of the loss, and without which it would not have occurred."

we may instance a fire which is purely accidental and which was not caused by any known human agency and also storms, lightning strokes, earthquakes, and floods or freshets.<sup>98</sup> In the absence of an express provision to that effect, the tenant is not excused from his covenant to repair because the damages necessitating the repairs are the result of an "act of God" or what is equivalent thereto are the result of damages by the elements.<sup>99</sup> When a tenant has covenanted to repair, and the buildings are destroyed by fire, or lightning, or the act of God as it is termed, the tenant must rebuild upon the demised premises. The reason is obvious. He has contracted expressly to do it. It is possible for him to restore that which has been destroyed, and if he does not do it he must respond in damages. By rebuilding, he will answer the covenant to repair, and he cannot avoid his obligation by reason of the destruction of the building, even without fault on his part. It is his contract and he must perform it if it is possible for him to comply, and the law will not excuse performance.<sup>1</sup> It will be seen at once that all these incidents or happenings which are enumerated above as the "act of God," are the outcome and manifestation of the ordinary operation of the laws governing and regulating the physical natural universe, and have been in law termed "the act of God" solely because of the theological conception present in the mind of the judge which regards the Deity as an ever present and universally active power continuously and incessantly carrying on the operation of the material world by means of laws which He has imposed upon it and puts in operation in it. To except

<sup>98</sup> McArthur v. Sears, 21 Wend. (N. Y.) 190; Ewart v. Street, 2 Bailey (S. Car.) 157, 23 Am. Dec. 132; Fish v. Chapman, 2 Ga. 349, 46 Am. Dec. 393; Polack v. Pioche, 35 Cal. 416, 95 Am. Dec. 115, 117.

<sup>99</sup> Paradine v. Jane, Aleyn, 27. In the case of School District No. 1 v. Dauchy 25 Conn. 530, 6 Am. Dec. 671, the court said: "This is altogether a mistake. The cases show no such exception, though there is some semblance of it in a single case which we will mention. The act of God will excuse

the not doing of a thing where the law had created the duty, but never where it is created by the positive and absolute contract of the party. The reason of this distinction is obvious. The law never creates or imposes upon any one a duty to perform what God forbids or what he renders impossible of performance, but it allows people to enter into contracts as they please, provided they do not violate the law."

<sup>1</sup> Steele v. Buck, 61 Ill. 343, 14 Am. Rep. 63.

therefore from the operation of a covenant to repair "damages by the elements" is equivalent to an exception of the act of God and excludes fires, floods, inundations and the like disasters in the causation of which there is no proof of any human intervention.<sup>2</sup> Damages by the elements cover destruction by fire which accrues without the fault or negligence of the lessee.<sup>3</sup>

**§ 537. Exception in covenant of accident or inevitable accident.** A provision that the tenant shall deliver up the premises at the end of the term in good condition or in good repair, barring "accident," or "inevitable accident," or "inevitable acci-

<sup>2</sup> Polack v. Pioche, 35 Cal. 416, 95 Am. Dec. 115, 117. In construing a lease where the words "damages by the elements" were used the court says in Harris v. Carlies, 40 Minn. 106, on pp. 107 and 108, 41 N. W. Rep. 940, 2 L. R. A. 349: "The terms 'the elements' and 'damage by the elements' are somewhat uncertain and indefinite expressions, and very little aid will be derived from resorting to any technical or scientific discussion of the word 'elements.' We should rather look to see whether the word has received any fixed and accepted meaning in the language of leases, and take the contract by its four corners and try to ascertain how such an expression would be ordinarily understood by conveyancers and business men." It appeared that in the lease in question the expression "by fire or the elements" occurred twice and it was provided that certain repairs were to be made in case of destruction "by fire or the elements." Continuing the court said: "It can hardly be said that the parties intended by these clauses of the lease literally to include every case of untenantability or partial untenantability by the elements. Every case

of damage to or destruction of human structures, not caused by animal force, may, in one sense, be said to be caused by the elements, as, for example, ordinary and gradual decay. But it would hardly be claimed that such a case would be within the meaning of the provisions of this lease. Or suppose, because of the manner of its construction, it should have proved when winter arrived, that the basement was untenantable because of the cold, it would scarcely be urged that this came within the terms of the lease. We think the language of the lease refers only to some sudden, unusual or unexpected action of the elements occurring during the term, such as floods, tornadoes or the like; extraordinary disasters, not anticipated by either party, the efficient cause of which originated after the term began, and which either destroyed the building, or left it in a materially and essentially worse condition. We think this is substantially the sense in which such expressions in leases have always been used, and in which they would now be ordinarily understood by business men in executing a contract."

<sup>3</sup> Van Wormer v. Crane, 51 Mich 363.

dents excepted," is sometimes inserted in a lease. The word "accident" in its legal meaning may be defined to be "an event happening without the concurrence of the will of the party by whose agency it was caused or an event that takes place without one's foreknowledge or expectation.<sup>4</sup> Thus, for example, a fire the cause of which is unknown, or is not proved by competent evidence, is an accident bringing a case within an exception in a lease which exempts the lessee from a loss by accident.<sup>5</sup> The distinction is made in all the cases between damage by accident and damage which is the result of the negligence of the tenant. If the damage to the building is the result and outcome of some voluntary action on the part of the tenant, or if it is produced by his failure or refusal to do some act which he was bound to do, it is then his negligence which produces this damage. But if the damage is the effect of a cause which is wholly outside of any action or neglect to act on his part, and particularly, if it is the result of a cause against which he could make no provision, or if he could provide against it if it is an event which he could not reasonably be expected to anticipate, it is the result of an accident. For example, the breaking of a window in the demised premises which might have been anticipated by the tenant and which he might have prevented by protecting the window with a screen or wire covering, is not an accident which would exempt him from liability to repair.<sup>6</sup> On the other hand,

<sup>4</sup> State v. Lewis, 107 N. Car. 967, 978, 12 S. E. Rep. 457, 13 S. E. Rep. 247; in McCarty v. New York, etc., R. Co., 30 Pa. St. 251, the court said: "If accident and negligence be not opposites we can not regard them as identical. Accident, and its synonyms casualty and misfortune, may proceed and result from negligence, or other cause known or unknown. What the court meant and in effect said, was, that the loss complained of may have resulted from the negligence of the defendants or from other causes beyond their control, if from the first, they would be liable for it; if from the last, they would not

and the jury were left to determine from the evidence whether it was fairly ascribable to that cause for which they were thus instructed the defendants would be liable." The burden of proving that the damage to, or the destruction of a building was the result of accident, or inevitable accident, is upon the lessee who is claiming the benefit of the exception in a covenant. Peck v. Scoville Manufacturing Co., 43 Ill. App. 360.

<sup>5</sup> Ford v. Phillips, 22 Rap. Jud. Que. C. S. 296.

<sup>6</sup> Peck v. Scoville Manufacturing Co., 43 Ill. App. 360, 362.

damages to the premises resulting from an extraordinary flood which could not have been anticipated,<sup>7</sup> or from a stroke of lightning, or from an explosion taking place in the adjoining premises,<sup>8</sup> or from fire which starts in adjacent premises, are within the meaning of a provision exempting the tenant from repairing, or from keeping the premises in good repair, or from delivering them in good condition in case of accident.<sup>9</sup> In a provision for the abatement of rent in case of destruction "by fire, flood, storm, tempest, or other inevitable accident," the last words mean something *ejusdem generis* with what had been previously mentioned and do not apply to that which though not avoidable so far as the lessee was concerned, was not in its nature inevitable, but resulted from the default of the lessor. The tenant is not entitled to an abatement of rent.<sup>10</sup> An exception in a lease to the effect that the lessee shall not be responsible for damages or destruction caused by accident does not raise an implied covenant on the part of the lessor to repair such damages or destruction,<sup>11</sup> nor does it exempt the lessee from his usual liability to pay rent though the building has been de-

<sup>7</sup> *Brown v. Susquehanna Broom Co.*, 109 Pa. St. 57, 1 Atl. Rep. 156, 58 Am. Rep. 708; *American Express Co. v. Smith*, 33 Ohio St 511, 31 Am. Rep. 561.

<sup>8</sup> *Allisen Mfg. Co. v. McCormick*, 118 Pa. St. 519, 12 Atl. Rep. 273; *Losee v. Buchanan*, 51 N. Y. 476, 10 Am. Rep. 623; *Spencer v. Campbell*, 9 W. & S. (Pa.) 32.

<sup>9</sup> For a definition of inevitable accident, see *Saner v. Bilton*, 47 L. J. Ch. 267, 7 Ch. D. 815, 38 L. T. 281; 26 W. R. 394.

<sup>10</sup> *Saner v. Bilton*, 47 L. J. Ch. 267, 7 Ch. D. 815, 38 L. T. 281, 26 W. R. 394. The word accident, when used to express a result produced by human action, is generally, if not universally understood to mean a thing done, or a disaster caused or produced without design or unintentionally; an event or occurrence which happens

unexpectedly from the uncontrollable operations of nature alone and without human agency; or an event resulting undesignedly and unexpectedly from human agency alone, or from the joint operation of both. *Morris v. Platt*, 32 Conn. 85. The equitable definition of the term "accident" includes not only inevitable casualties, such as are caused by the act of God, but also those that arise from unforeseen occurrences, misfortunes, losses, and acts or omissions of other persons without the fault, negligence, or misconduct of the party. *Bostwick v. Stiles*, 35 Conn. 198; *Alexander v. Bailey*, 2 Lea (Tenn.) 639.

<sup>11</sup> *Kline v. McLain*, 33 W. Va. 32, 10 S. E. Rep. 11; *Clifton v. Montague*, 40 W. Va. 300, 21 S. E. Rep. 858.

stroyed by accident though he may not then have to repair.<sup>12</sup> Whether the lessee has brought himself within the exception of inevitable accident or unavoidable casualty is, where there is a conflict in the evidence, a question for the jury. If the tenant is exempt from damages which are caused by an inevitable casualty it is for the jury to determine upon all the proof whether the fire or other casualty which destroyed the premises, could have been avoided by his using diligence or skill<sup>13</sup> in caring for the premises. A provision exempting a lessee from the operation of a covenant to restore the demised premises at the end of the term if they are destroyed by inevitable accident does not apply to the furniture in the premises hired by the lessee with the premises and for which the lessee agreed to return furniture of equal value.<sup>14</sup> The burden of proving that damages to the building were caused by "inevitable accident or casualty" is upon the lessee claiming the benefit of an exception<sup>15</sup> in a covenant to repair except in case of "inevitable accident" or unavoidable casualty.<sup>16</sup>

**§ 538. The tenant's covenant to deliver up a farm in good condition.** A covenant by the tenant of a farm to deliver the premises in as good condition as when received, ordinary wear and tear and unavoidable casualty excepted, binds him to cultivate the farm in a husbandlike manner, and not to do any act or make any use of the land which will render it less valuable for its purpose as farm land at the end of the term than it was at the beginning. If he shall permit the land to be overrun by weeds and brush where it was reasonably clear when he entered,

<sup>12</sup> Davis v. George, 67 N. H. 393, 39 Atl. Rep. 979.

<sup>13</sup> Kelly v. Duffy (Pa.), 11 Atl. Rep. 244.

<sup>14</sup> Davis v. George, 67 N. H. 393, 39 Atl. Rep. 1979.

<sup>15</sup> Peck v. Scoville Mfg. Co., 43 Ill. App. 360.

<sup>16</sup> A casualty is defined in the cases as that which comes without design, or without being foreseen; an event inevitable, and not to be guarded against; contingency. Webster Dictionary. Inevitable accident, is an event

which is not to be foreseen or guarded against. Standard Dictionary. Chance is what happens by chance; contingency. Century Dictionary. See also Ennis v. Fourth Street Building Association, 102 Ind. 520, 522, 71 N. W. Rep. 426; Crystal Springs Distillery Co. v. Cox, 67 Fed. Rep. 693, 695, and Miland v. Meiswinkel, 82 Ill. App. 522, 527, in which last case it was held that whether the flooding of a sewer was a casualty was for the jury.

or if he shall cut more timber than is necessary for the ordinary use which he makes of the farm, he will be held liable for a breach of the covenant. Nor is it material how carefully he cultivates the farm if the result of his operations is that the land or buildings are at the end of the term in worse repair than they were when he entered. Thus, a tenant who is bound "to deliver the premises in as good condition as when received, ordinary wear and tear and unavoidable casualty excepted," is not justified in planting and cultivating corn in a young orchard, and he is therefore liable for the damages resulting thereby irrespective of any care he may use. Plowing up young apple trees, and otherwise injuring them by reason of planting a crop in the orchard does not constitute ordinary wear and tear of a farm rented from year to year.<sup>17</sup> A tenant, however, who covenants to restore a farm in as good repair or in the same condition as he receives it, is of course not bound to restore it in any better repair or condition, and his failure to do this is not a breach of his covenant.<sup>18</sup> A lessee who covenants to keep a farm leased by him in as good repair as when he took it is not bound to keep it in such repair as ordinarily prudent farmers do and to use such diligence as they use to keep their farms in repair. He need only keep the farm in the condition of repair it was when he entered upon it. If it was in bad condition, he is not bound to improve it.<sup>19</sup> An agreement on the part of the tenant of a farm to take all proper care thereof as a careful and prudent farmer would of his own property, and to return the farm in as good condition as the same was received, except natural wear and tear or unavoidable accidents, is broken by the tenant permitting thistles to grow and go to seed on

<sup>17</sup> Thomson v. Cummings, 39 Mo. App. 537.

<sup>18</sup> A lease of land for farming raises an implied covenant that the land shall be used for farming purposes exclusively and in the absence of an express covenant excepting waste raises also an implied covenant that the lessees shall not commit or permit waste, that he will farm the

land in a husbandlike manner and that he will not exhaust the soil by negligent or improvident tillage and that he will repair fences so far as the rules of good husbandry permit. He must return the farm in at least as good condition as when he received it. Foster v. Batt, 6 Mass. 63.

<sup>19</sup> Vincent v. Crane, 10 Detroit Leg. N. 653, 97 N. W. Rep. 34, 36.

the lands and by his grazing sheep in a meadow so as to destroy it.<sup>20</sup> But an agreement by the landlord that he will pay the tenant of a farm a reasonable compensation for repairs, will not enable the tenant to recover for cultivating and fertilizing the soil under the heading of repairs.<sup>21</sup>

§ 539. **The making of alterations by a tenant may be a breach of a covenant to repair.** The making of material alterations or changes in the premises by which its condition is substantially changed may under some circumstances constitute a breach of a covenant to repair or to leave the premises in good repair at the end of the term. Everything depends on the particular facts of the case. Some alterations will tend to cause a dilapidation of the premises; others will improve their condition. In the former case there is no question that the covenant to repair is broken if the dilapidation be not restored. Alterations which improve the building are presumptively not a breach of a covenant to repair provided they do not in fact leave the premises in a condition of disrepair. Thus, the lessee breaks his covenant where he broke through the wall of the demised house into the one adjoining,<sup>22</sup> and left the opening unclosed at the end of the term. So, to pull any portion of the premises down is a breach of a covenant to repair. A covenant to repair and support and maintain a brick wall is broken by pulling down the wall.<sup>23</sup> On the other hand, it has been held that the mere enlargement of windows, opening doors and taking down partitions are not a breach of a covenant to keep in

<sup>20</sup> McBride v. Daniels, 92 Pa. St. 332.

<sup>21</sup> Cornell v. Vanartsdal, 4 Pa. St. 364. An agreement that a landlord will advance money for improvements and repairs to be made by the tenant on a rice plantation so as to enable the tenant to make a crop was construed not to refer solely to repairs the necessity for which existed at the time of the leasing. The purpose of the covenant was to enable the tenant to make a crop. To make a crop is to plant it, to

cultivate it and to harvest it. Hence any injury to the premises sustained after the lease which would interfere with the tenant making a crop would come within the agreement and whether the necessity for these repairs arises from an ordinary or an extraordinary casualty is not material. Mitchell v. Nelson, 13 S. C. 105, 114.

<sup>22</sup> Doe d. Vickery v. Jackson, 2 Stark, 293.

<sup>23</sup> Doe d. Wetherell v. Bird, 6 Car. & P. 195.

repair a dwelling house together with such additions as should be made by the tenant.<sup>24</sup> And it has also been held that a covenant to repair and keep up the premises does not prevent the lessee from pulling down and re-erecting new premises, unless this is expressly forbidden by the terms of the lease.<sup>25</sup>

**§ 540. Repairs to be approved by the landlord.** A covenant by the tenant that he will repair to the satisfaction of the landlord, or that he will make alterations which are to be approved by the landlord means no more than that the landlord must be satisfied in reason. He must approve of all the tenant does if it is reasonable under all the circumstances. The landlord cannot arbitrarily express dissatisfaction or refuse his approval. If from all the facts and taking into consideration the extent and character of the repairs, the amount expended, and character and use of the premises, a reasonable man in the landlord's place would have been satisfied or would have approved of them, the landlord will be presumed to have done so. And in this connection it may be said that an agreement to repair to the satisfaction of the landlord or an agreement to do repairs to be approved by him are identical in meaning. The jury will always determine whether he should have approved or should have been satisfied. In a case where the lessee was to be allowed to retain a certain sum of money out of the rent provided he had spent that amount in repairs and alterations which were to be inspected and approved by the lessor and which were to be done in a substantial manner, the approval of the lessor is not a condition precedent to the right of the lessee to retain the money. The gist of the agreement is that the work is to be done in a substantial manner and the approval and inspection by the lessor are only to enable him to ascertain that the work had been done. It cannot be conceived that he might capriciously withhold his approval which he might have the right to do if the giving it were a condition precedent. This condition would absolutely destroy the thing granted, i. e., the right to retain the money spent by the tenant in alterations and repairs which otherwise he would be entitled

<sup>24</sup> Doe d. Dalton v. Jones, 1 N. & M. 6, 4 B. & Ad. 126, 2 L. J. K. B. 11. provement Co., In re, 61 L. J. Q. B. 164. And see Doherty v. All-

<sup>25</sup> McIntosh and Pontyridi Im- man, 3 App. Cas. 709, 39 L. T. 129, 26 W. R. 513.

to if he has had the repairs done in a substantial manner.<sup>26</sup> Such an agreement is very clearly to be distinguished from a stipulation in a contract to build under which no payments are to be made to the builder without the certificate of a surveyor or architect who is expressly or by necessary implication constituted an arbitrator between the parties.<sup>27</sup>

**§ 541. Right of the landlord to recover from a tenant who has agreed to make repairs.** Where a tenant who has expressly covenanted with his landlord to make improvements on the premises or to put or to keep them in repair refuses or neglects to do so after a notice or request by the landlord, the latter may make the repairs, and he may then recover the sum which has been necessarily paid by him for the same from the tenant. He may recover the fair market value of such repairs. The tenant who on hiring a house in bad repair covenants to pay all the expenses of improving or repairing the premises during his occupancy or during the term is bound to do more than merely to make such repairs as are necessary to preserve the house in the bad condition in which it was when he moved in. This he would be bound to do in any case under the law in the absence of an express agreement to do so. But his express covenant binds him to make all necessary changes and repairs which are essential to put the premises in a safe and sound condition and if he shall not do this the landlord may do it and recover as damages his reasonable expenditures under the covenant.<sup>28</sup> So, when a tenant who has agreed to make all changes and repairs necessary to comply with the orders of the board of health or the municipal authorities, refuses on the request of the landlord to do so, the landlord may have the same made and, after demand, recover his expenses from the tenant. In all such cases the amount recovered by the landlord is in theory of the law regarded as a part of the rent which the tenant has agreed to pay for the use of the premises.<sup>29</sup>

**§ 542. Covenants by the lessee to erect improvements.** Covenants by which the lessee binds himself to erect buildings or to make other improvements on the land demised though they do

<sup>26</sup> Dallman v. King, 4 Bing. <sup>28</sup> Martinez v. Thompson, 80 (N. C.) 105, 5 Scott, 382, 3 Hodges, Tex. 568, 16 S. W. Rep. 334.

283, 7 L. J. C. P. 6. <sup>29</sup> Seymour v. Picus, 9 Misc.

27 Morgan v. Birnie, 9 Bing. 672. Rep. 48, 29 N. Y. Supp. 277.

not occur frequently in leases are still met with often enough to justify giving them some consideration in this place. A lessee who covenants to place a building upon the land generally or during his term, no particular period being specified within which the building must be erected or the improvement must be made by him, has the whole term to do it and the lessor cannot maintain an action against him for a breach of this covenant until the term is at an end.<sup>30</sup> The failure of the lessee to live up to his covenants to erect buildings or to improve farm land does not usually operate as a forfeiture of the lease unless expressly so provided.<sup>31</sup> The lessor has merely an action on the lessee's covenant and the measure of his damages is what it would cost him to make the improvements himself on the land or the fair and reasonable value of the buildings to be erected together with the loss of rental value until such improvement could be made after the term has expired. But where either from the express language of the lease itself, or from necessary implication on its language, it appears that the agreement to make improvements was a condition precedent to the enjoyment of the demised premises by the lessee, his failure to perform this condition, unless properly excused, will enable the lessor to reenter for a breach of condition.<sup>32</sup> But a right to reenter for a breach of a condition or covenant to make improvements by a lessee may be waived by the lessor accepting rent after the breach has occurred and has become known to him or by his silence or conduct from which an estoppel may be fairly implied.<sup>33</sup> But, though holding over after the expiration of a lease for a year may have renewed all covenants which are consistent with or applicable to a lease from year to year, it does

<sup>30</sup> Chipman v. Emeric, 5 Cal. 49, 51, 63 Am. Dec. 80; Gates v. Hendrick, 54 Hun, 92, 7 N. Y. Supp. 229; Palethorp v. Bergner, 52 Pa. St. 149.

<sup>31</sup> Handschy v. Sutton, 28 Ind. 159, 161; Butler v. Walker, 78 Ill. 622, 624. The lessor has merely an action on the lessee's covenant and his measure of his damages is what it would cost him to make the improvements him-

self on the land or the fair and reasonable value of the buildings to be erected together with the loss of rental value until such improvement could be made after the term has expired. Butler v. Walker, 78 Ill. 622, 624.

<sup>32</sup> Tate v. McClure, 25 Ark. 168; Winn v. State, 55 Ark. 360, 18 S. W. Rep. 375.

<sup>33</sup> Riggs v. Pursell, 66 N. Y. 193.

not waive the lessor's right to recover damages for the lessee's breach of a covenant to build during the year. This covenant was broken at the expiration of the term and was not renewed by the holding over<sup>34</sup> of the tenant in the absence of an express agreement to that effect.

**§ 543. The tenants' conditional covenants to repair.** A landlord who has agreed to put premises in repair before the tenant entered on them cannot enforce against his tenant the covenant of the latter to keep in good repair until he has put the premises in good repair himself. The performance of the covenant by the landlord to put the premises in repair is a condition precedent to the keeping in repair by the tenant; and the performance of this condition precedent by the landlord being indivisible, it follows that the landlord cannot recover until he has performed all of his covenant. Hence, a landlord cannot repair a portion of the premises leaving the balance out of repair and then recover damages from the tenant for not keeping that portion of it in repair.<sup>35</sup> So, where a tenant covenants that "from and after the amendment and repair" of the demised premises he would repair them during the term and leave them in good and sufficient repair at the end thereof, no action can be maintained against him by the landlord on this covenant unless the landlord has himself amended and repaired the premises.<sup>36</sup> So, in the case of a covenant by the lessee to keep buildings in repair they must first be put in repair by the landlord. The covenant is merely an agreement on the part of the tenant to repair after the landlord shall have put the premises in repair, and the words expressly indicating that the premises are to be first put in repair by the landlord constitute an implied covenant on his part to make repairs.<sup>37</sup> The performance of an agreement by the landlord to supply sufficient wood for the tenant to do the repairs is a condition precedent to the performance of the tenant's agreement to repair. Thus, where the tenant was to repair "*being allowed*" a certain quantity of timber it was held that no obligation rested on the tenant to repair un-

<sup>34</sup> Pollman v. Morgester, 99 Pa. St. 611, 614.

<sup>35</sup> Neale v. Radcliffe, 15 Q. B. 916, 20 L. J. Q. B. 130, 15 Jur. 166.

<sup>36</sup> Cannock v. Jones, 3 Exch. 233, 5 Exch. 713.

<sup>37</sup> Neale v. Radcliffe, 15 Q. B. 916; Thomas v. Cadwallader, Willes, 496, cited 1 E. & E. 487.

til he had been allowed or supplied with timber by the landlord or at all events until the landlord had made a tender of a sufficient amount of timber.<sup>38</sup> And where the tenant has agreed to complete a building under the direction and to the satisfaction of some person to be named by the landlord, the naming of such person is a condition precedent to the performance by the lessee of his covenants to complete the building.<sup>39</sup>

**§ 544. The character of the building erected by the lessee.** The lessee's covenant to build a structure of a particular description or character or for a particular purpose upon land leased to him is not satisfied by the erection by him of an edifice of an entirely different character or adapted to a different purpose. If he agrees to build a dwelling house, he cannot erect a factory or business building. Hence, if he is to erect a dwelling house within a particular period which is specified, and, in consideration of so doing, the lessor agrees to renew the lease at its expiration or at his option to pay the appraised value of the house erected by the lessee under his covenant, the latter can neither compel a renewal nor secure compensation for his improvements where he builds a factory or business structure and not a dwelling on the premises. The erection by the lessee of a building other than that specified in his covenant is a mere voluntary act on his part giving him no rights to compel the lessor to perform his dependent covenant; nor does the fact that the lessor, with knowledge of the kind of a building the lessee has erected on the premises, continues thereafter to collect and receive rent from him constitute a waiver of the breach of the lessee's covenant.<sup>40</sup> But where, in the case of a covenant by a lessee to erect a dwelling house on the premises, the lessor, before the date has arrived by which the lessee must perform his covenant, fully releases him from the obligation of this covenant, the lessee is discharged from his covenant to build while the lessor is likewise discharged from his covenant to renew or to pay the appraised value of the building. The obligation of

<sup>38</sup> Martyn v. Clue, 18 Q. B. 661.

<sup>39</sup> Hunt v. Bishop, 8 Exch. 675; Hunt v. Renout, 9 Exch. 635; Coombe v. Greene, 11 M. & W. 480.

<sup>40</sup> McIntosh v. Rector, etc., of St. Phillips Church in the City of

New York, 120 N. Y. 7, 12, 23 N. E. Rep. 984. In this case the lessor was bound to renew "if such dwelling house shall be standing on the demised premises at the end of the term."

the lessee to build was discharged by the release of the lessor but the lessee's right to build at his election was preserved intact. If he shall thereafter build a dwelling house of the kind required by his covenant, he again becomes entitled to a renewal or to compensation on the expiration of the lease if the house he has built shall then be standing; though of course he would have no right on the lessor's covenants to renew or to compensate him in case he shall erect a structure essentially different from what he agreed to build.<sup>41</sup>

**§ 545. The right of a sub-tenant under a covenant to repair made by the original lessor.** A sub-tenant cannot recover damages which he has sustained by reason of the failure of the original lessor to observe the obligations of a covenant to repair which the original lessor has made with the lessor of the subtenant. There is no privity either of contract or estate between the subtenant and the first or original lessor so that the former must pursue his remedy for injuries received by his being upon dangerous and unsafe premises against the person who in fact, invited him to come upon the premises and who has the actual possession and control of the same. He must secure redress if at all from that person without whose invitation or consent he would not have been in the place where he received his injury. The original lessor owes no contract duty or covenant obligation to repair to the subtenant, though the duty to keep his premises free from the presence of a dangerous nuisance which is incumbent upon all owners of property by virtue of the maxim *sic utere tuo ut alienum non laedas* still rests upon him.<sup>42</sup>

**§ 546. The measure of damages for the lessee's failure to repair, or leave the premises in good condition.** The measure of damages for the lessee's wrongful removal of personal property from the premises where he is sued on a covenant to restore the premises in as good a condition as he found them at

<sup>41</sup> Smith v. Rector, etc., of St. Phillips Church, 107 N. Y. 610, 616, 14 N. E. Rep. 825.

<sup>42</sup> Burdick v. Cheadle, 26 Ohio St. 397 (customer of the tenant); Peterson v. Smart, 70 Mo. 38; Quay v. Lucas, 25 Mo. App. 4, 9. See also in support of the general rule that one not a party to a

contract cannot maintain an action in tort thereon. Robbins v. Jones, 15 Com. Bench (N. S.) 238; Alton v. Railroad Co., 19 C. B. (N. S.) 213; Blakeman v. Railroad, 8 El. & Bl. 1053, 1054; Winterbottom v. Wright, 10 Mee. & Wel. 109.

the beginning of the term,<sup>43</sup> or to repair and to leave in good repair,<sup>44</sup> is the fair and reasonable cost of replacing everything which the lessee was bound to put on the premises to restore them to the condition in which he received them, or to a condition of good repair. All the consequences of a refusal to repair by the tenant should be considered by the jury in determining the damages. Consequences which are subsequent as well as those which are prior to the action if they arise from the breach of the covenant to repair, should be considered. But the subsequent consequence in order to be considered must be such as naturally and necessarily flow from the breach of the covenant and merely speculative injuries which are remote, uncertain and contingent, give no ground for damages.<sup>45</sup>

**§ 547. Evidence in actions on covenants to repair.** Speaking in general terms, the rules which regulate the relevancy, competency and admissibility of evidence in actions in a court of law are applicable to actions to recover damages upon the breach of a covenant to repair whether by the landlord or the tenant. The testimony of expert builders and real estate dealers is admissible to show how much the premises have been injured by the alterations made by the tenant if it shall appear that the witnesses are familiar with the market value and rental value of similar premises.<sup>46</sup> Where a tenant has covenanted to deliver up the premises in a good state of repair at the end of the term, he will not be allowed to show their bad condition when he entered, though such evidence ought to be received when he is sued for leaving the premises in bad repair, on his covenant to deliver them in the same condition as they were when he entered. If he agrees to deliver premises in good repair, he will not be permitted to prove the fence was in as good condition as that of his neighbors.<sup>46a</sup> He may show that his landlord at a particular period during or at the termination of the lease expressed himself as satisfied with the condition of the premises.<sup>47</sup>

<sup>43</sup> Watriss v. First National Bank, 130 Mass. 343.

<sup>46</sup> In re Jewell, 13 Fed. Cases No. 7,302, 19 N. B. R. 383.

<sup>44</sup> Scott v. Haverstraw Clay & Brick Co., 135 N. Y. 141, 31 N. E. Rep. 1102, affirming 62 Hun, 620, 16 N. Y. Supp. 670.

<sup>46a</sup> Grayson v. Buie, 26 La. Ann. 637.

<sup>45</sup> Cooke v. England, 27 Md. 14,

<sup>47</sup> Graysen v. Buie, 26 La. Ann. 637.

**§ 548. Rules of pleadings.** The general rules and principles of pleading, whether at common law or under some system of code pleading, which are usually and ordinarily employed in an action on covenant may be followed in an action on a covenant to repair. The covenant may be pleaded according to its legal force and effect.<sup>48</sup> The plaintiff if he has made the repairs which the defendant was bound to make must allege in his declaration that he has done so and that the defendant had notice thereof.<sup>49</sup>

**§ 549. The duty of the landlord to build and repair fire-escapes.** There is no duty upon the landlord even of a tenement house independently of the statute, ordinance or express contract with his tenants to provide fire escapes for the tenant, members of his family or for his visitors.<sup>50</sup> Fire escapes are required to be placed upon dwellings and other buildings of a certain class almost universally by the statutes and ordinances of the various states and municipalities. The duty is imposed upon the landlord by the statute for the sole benefit of his tenants. Hence, the duty having been imposed on the landlord, a breach of it gives anyone who is injured thereby a cause of action. For as duty and right are correlated if a duty is imposed there must be some one who shall have the power to enforce its performance.<sup>51</sup> The provisions of the statutes differ slightly in the several states. In New York the landlord is not permitted

<sup>48</sup> Stultz v. Locke, 47 Md. 562.

<sup>48a</sup> Trustees v. Stevenson, 1 Houst. (Del.) 451.

<sup>49</sup> Norfleet v. Cromwell, 64 N. C. 1.

<sup>50</sup> Schmalzried v. White, 13 Pickle (Tenn.) 36, 41, 36 S. W. Rep. 393, 32 L. R. A. 782, citing and relying on Jones v. Granite Mills, 126 Mass. 84, 30 Am. Rep. 661; Keith v. Granite Mills, 126 Mass. 90, 30 Am. Rep. 366; Pauley v. Steam Gauge Co., 131 N. Y. 90, 194, 29 N. E. Rep. 999, 15 L. R. A. 194; Bajus v. Syracuse, etc., R. Co., 103 N. Y. 316, 8 N. E. Rep. 529, 57 Am. Rep. 723.

<sup>51</sup> Willy v. Mulledy, 78 N. Y.

310, 314, 34 Am. Rep. 536, 6 Abb. new cases 97; in Schmalzried v. White, 13 Pickle (Tenn.) 36, 41, 36 S. W. Rep. 393, 32 L. R. A. 782, the duty to provide fire escapes was imposed by ordinance and the court, distinguishing between a duty imposed by ordinance and one imposed by statute admits that, if the duty to furnish fire escapes was created by statute a tenant injured because of the failure to furnish fire escapes would have a good cause of action aside from any question of negligence. See also sustaining the text, Rose v. King, 49 Ohio St. 213, 30 N. E. Rep. 267, 15 L. R. A. 160.

by the statute to wait until he is actually notified by the authorities to put up a fire escape. He must with reasonable promptness ascertain what sort of fire escape is directed and approved by them and he must then erect it with due diligence and keep it in good repair. The tenant has a right to assume that the landlord has complied with the statute. If the tenant enters without having ascertained that there was no fire escape attached to the premises, or if after his entry he discovers that fire escapes are totally absent, he is not guilty of contributory negligence because he does not at once remove from the premises. He has a reasonable period in which to look for and to remove to other apartments or to notify his landlord to erect the appliances for his protection required by the statute.<sup>52</sup> A statute which imposes the duty to erect fire escapes on factories or

<sup>52</sup> Willy v. Mulledy, 78 N. Y. 310, 314, 34 Am. Rep. 536; McLaughlin v. Armfield, 58 Hun, 376, 377. The ownership of property by the landlord for five years raises a conclusive presumption that the landlord knew fire escapes were not erected on his building as required by the statute. The statute is intended to protect human life, its intention is easily discovered and there is no reason why courts should strain after such a strict construction of the statute as will nullify it. McLaughlin v. Armfield, 58 Hun, 376, 378, 12 N. Y. Supp. 164, construing Laws 1888, c. 583, tit. 14 § 16. See also McRickard v. Flint, 114 N. Y. 222; Ames v. Ayer, 192 Ill. 601, 61 N. E. Rep. 851. Though a statute fails to provide that one who does not furnish a fire escape under its provision shall be liable civilly for damages caused by his neglect, still he is liable. Where a statute requires an act to be done or abstained from by one person for the benefit of another, an action lies in favor of the latter against

the former for neglect in such act or abstinence by virtue of the maxim *ubi jus ibi remedium*. The imposition of a penalty by the statute does not prevent civil action for negligence, unless the penalty be given to the party who is aggrieved in satisfaction of his injury. And if a duty is created to an individual and the penalty imposed for its breach is inadequate compensation to him for the injury received the penalty is cumulative and not exclusive and if the duty is imposed to an individual and the penalty is payable to the state, or to an informer, the right of the individual to maintain an action on the case for a breach of this duty to him is unquestionable. See Rose v. King, 49 Ohio St. 213, 225, 30 N. E. Rep. 267, 15 L. R. A. 160, citing Couch v. Steel, 77 Eng. C. L. 402; Jetter v. Railroad, 2 Abb. App. 458; Messenger v. Pate, 42 Iowa, 444; Siemers v. Eisen, 54 Cal. 418; Willis v. Mulledy, 78 N. Y. 310; Parker v. Barnard, 135 Mass. 116.

workshops does not impose the duty to place fire escapes on a tenement house though the separate apartments may be used as workshops. There is a clear distinction between the two classes of structures. A building though it be fitted for manufacturing but never used as a factory, is not within the statute, while a building constructed for other purposes but used for manufacturing is a factory within the statute. The use of the building determines the duty of the owner. But where the duty is by the statute placed upon the owner of the workshop, the owner of the land or building who is not the owner of the workshop or factory which is being carried on in his premises is under no obligation to erect fire escapes though he would be under such an obligation if he were himself the owner of the factory or establishment which is carried on in his building. His knowledge of or consent to another person carrying on a factory in his building, does not render him liable for damages to a person who suffers because of the absence of fire escapes on the building.<sup>53</sup> A statute which requires fire escapes to be placed on "tenements" means a house the different rooms or apartments of which are let for residence purposes by the owner to others as distinct tenements so that each tenant as to his room or apartment sustains to the common landlord, the same relation as one occupying a whole house would to his landlord.<sup>54</sup> The landlord is not liable to one who going upon the fire escape of a tenement house which is in bad repair, falls to the ground and is

<sup>53</sup> Lee v. Kirby, 10 Weekly Law Bul. 449, 11 Weekly Law Bul. 166, affirmed in Lee v. Smith, 42 Ohio St. 458, 51 Am. Rep. 839.

<sup>54</sup> Rose v. King, 49 Ohio St. 213, 226, 30 N. E. Rep. 267, 15 L. R. A. 160. See also as to meaning of "owners" used in statute Schott v. Harvey, 105 Pa. St. 222, 51 Am. Rep. 201. As to constitutionality of fire escape statutes see Cincinnati v. Steinkamp, 54 Ohio St. 284. See also Corrigan v. Stillwell, 54 Atl. Rep. 389, 97 Me. 247. Where a statute permits the form and character of a fire escape to be determined by an owner pro-

vided he shall select a safe and permanent device he takes the risk of it being permanent and safe. Sewell v. Moore, 166 Pa. St. 570, 31 Atl. Rep. 370. It must be such as would be considered safe by men of ordinary reason and prudence, due consideration being given to the structure and use of the building and the means of exit. It need not be the safest that might be desired nor is the owner liable if having erected a suitable fire escape a fire cuts off access to it. Kelly v. O'Connor, 106 Pa. St. 321.

killed. The fact that the statute makes it incumbent on the landlord to put fire escapes upon his house and to keep them in good repair does not render him liable to one who is injured because they are not in repair. The sole use and purpose of the fire escape is to afford protection and escape to the tenants in case of fire. It was not meant to be a balcony or to be used as such even though its edge is surrounded in part by an iron railing which is apparently placed there for the protection of persons who may be called to go upon the fire escape. A person who goes upon the fire escape from out a window which opens upon him for purposes of amusement or pleasure, or to take the air or for any other purpose than that for which the structure was exclusively intended and erected is a trespasser as to the landlord to whom the latter owes no duty to keep the structure in a safe condition. Nor can there, in case of an injury to an infant under such circumstances, any allurement or invitation be implied from the condition of affairs as might be implied where an owner of land permits a dangerous and unsafe building or machinery to remain upon it which is calculated, by reason of its peculiar character, to attract children to it.<sup>55</sup>

<sup>55</sup> *McAlpin v. Powell*, 70 N. Y. 126, 134, which makes this distinction very clear. A "child is permitted to go into the public streets, which are open to persons of all ages, without being chargeable with negligence, and being there, if led by attractions into danger, even although it may be that, under some circumstances, an action would lie for injuries sustained thereby, such a case has no similarity to one where the child is left without any one to take especial charge of him, and escapes through an open un-

guarded window to a place of danger, and sustaines an injury without any allurements being held out to him. A wide distinction exists between the two cases, and while the one at bar is on the border line and the point of difference is perhaps very close, this distinction is fully recognized in the best considered adjudications in the courts, and is the turning point upon which cases of this character are to be determined." See also *Mayer v. Laux*, 43 N. Y. Supp. 743.

## CHAPTER XXIII.

### THE ESTOPPEL TO DENY THE TITLE.

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§ 550. The general rule as to the tenant's estoppel. It is a well settled general rule that a lessee cannot deny the title of his landlord. By accepting a lease and becoming a tenant, the person admits the title of his landlord, and is therefore, so long as he continues in possession of the premises, precluded from denying the landlord's title.<sup>1</sup> This rule is said to be founded

<sup>1</sup> *Griffith v. Parmley*, 38 Ala. 393; *Littleton v. Clayton*, 77 Ala. 571; *Hughes v. Witt*, 28 Ark. 153; *Mantooth v. Burke*, 35 Ark. 540; *Knowles v. Murphey*, 107 Cal. 107, 40 Pac. Rep. 111; *Lyon v. Washburn*, 3 Colo. 201; *Goodman v. Jones*, 26 Conn. 264; *Reed v. Todd*, 1 Har. (Del.) 138; *Williams v. Cash*, 27 Ga. 507, 73 Am. Dec. 739; *Cram v. Kroger*, 22 Ill. 74; *Alwood v. Mansfield*, 33 Ill. 452; *Reese v. Caffee*, 133 Ind. 14, 32 N. E. Rep. 720; *Ellis v. Fitzpatrick*, (Ind. Ter.) 118 F. 430; *Bowdish v. City of Dubuque*, 38 Iowa, 341; *Pettigrew v. Mills*, 36 Kan. 745, 147, 14 Pac. Rep. 170; *Chambers v. Pleak*, 6 Dana (Ky.) 426, 429, 32 Am. Dec. 78; *Lively v. Ball*, 2 B. Mon. (Ky.) 53; *Hodges v. Shields*, 18 B. Mon. (Ky.) 828; *Moshier v. Reding*, 12 Me. 478, 481; *Heath v. Williams*, 25 Me. 209, 218, 43 Am. Dec. 205; *Giles v. Ebsworth*, 10 Md. 333, 344; *Inhabitants of Eastham v. Anderson*, 119 Mass. 526; *Ryerson v. Eldred*, 18 Mich. 12, 22; *Bertram v. Cook*, 32 Mich. 518, 521; *Winston v. Academy*, 28 Miss. 118, 121, 61 Am. Dec. 540; *Allen v. Chatfield*, 8 Minn. 435, 440; *Morrison v. Bassett*, 26 Minn. 235, 237, 2 N. W. Rep. 851; *Cummings v. Kilpatrick*, 23 Miss. 106; *Frazer v. Robinson*, 42 Miss. 121; *Newman v. Mackin*, 21 Miss. 383, 387; *Loring v. Harmon*, 84 Mo. 123; *Shepard v. Martin*, 31 Mo. 492, 495; *Walker v. Harper*, 33

Mo. 592; *Higgins v. Turner*, 61 Mo. 249, 251; *Grant v. White*, 42 Mo. 285, 291; *Dixon v. Finnegan* (Mo. 1904), 81 S. W. Rep. 576; *Anderson v. Marshall*, 7 Mont. 288, 16 Pac. Rep. 576; *Corrigan v. Riley*, 26 N. J. L. 79, 81; *Plumer v. Plumer*, 30 N. H. 558; *Prevost v. Lawrence*, 51 N. Y. 219; *Hardy v. Ackerly*, 15 Barb. (N. Y.) 148; *Tompkins v. Snow*, 63 Barb. (N. Y.) 525; *James v. Russell*, 92 N. Car. 194, 197; *Dixon v. Stewart*, 113 N. Car. 410, 415, 18 S. W. Rep. 325; *Conwell v. Mann*, 100 N. Car. 234, 6 S. E. Rep. 782; *Devacht's Lessee v. Newsam*, 3 Ohio 57, 60; *Hammill v. Jelonick*, 3 Okl. 223, 41 Pac. Rep.; *Rappe v. Front*, 3 Okl. 260, 265, 41 Pac. Rep. 397; *West Shore Mills Co. v. Edwards*, 24 Oreg. 475, 478, 33 Pac. Rep. 987; *Heckart v. McKee*, 5 Watts (Pa.) 385; *Newell v. Gibbs*, 1 Watts & S. (Pa.) 491. *Smith v. Crosland*, 106 Pa. St. 413; *Elliott v. Smith*, 213 Pa. St. 413; *Hamilton's Lessee v. Marsden*, 6 Binn. (Pa.) 45, 49; *Darby v. Anderson*, 1 Nott. & Me. (S. Car.) 369; *Givens v. Mullinax*, 4 Rich. L. (S. Car.) 590, 55 Am. Dec. 706; *Rogers v. Waller*, 4 Hayw. (Tenn.) 205, 9 Am. Dec. 758; *McIntire v. Patton*, 9 Humph. (Tenn.) 447; *Smith v. Smith*, 81 Tex. 45; *Bryan v. Hanrick* (Tex.), 8 S. W. Rep. 282; *Tyler v. Davis*, 61 Tex. 674; *Voss v. King*, 33 W. Va. 236, 10 S. E. Rep. 402; *Tondro v. Cush-*

on considerations of public policy and is only recognized where the relation of landlord and tenant exists. But like every other character or species of estoppel, it is not very favorably regarded by the courts and will not be pushed further than is necessary to protect the rights of the parties. It is rather a rule of evidence than of positive law. Its effect is to prevent an investigation into the actual truth under certain circumstances. At least that is its effect as above stated but there have been several exceptions created to the rule by which its scope has been greatly limited so that, in modern times at least, the rule itself does not have so broad an effect in precluding the courts from looking into the real circumstances of the case as might be expected. Of course, it is based like every other estoppel upon the fact that the person estopped has by conduct or statement asserted some fact under circumstances which, if he were permitted to deny it, would work an injustice to the other party. For the ground upon which the estoppel is based is this, that when a man without fraud on the part of the other party does something or alleges something upon which the other, believing his statement to be true, has acted what he says will be presumed to have been true and he will not thereafter be permitted to deny it. The estoppel is equally binding on both of the parties to the lease, so that while the tenant cannot deny his landlord's title, the landlord is equally bound not to deny the right or title of his tenant. As will be subsequently pointed out, the estoppel exists only during the tenancy either express or implied. After the term is ended whether by surrender or otherwise, the tenant may set up a title in himself. Or he may during the term repudiate the relationship existing between him and his landlord and set up an adverse title in himself which may ripen into a title under the statute of limitation. In conclusion it may be said that the tenant is not permitted to

man, 5 Wis. 279, 288; Lawson v. Mowry, 52 Wis. 219, 9 N. W. Rep. 280; Strain v. Gardner, 61 Wis. 174, 184, 21 N. W. Rep. 35; Ricketson v. Galligan, 89 Wis., 394, 62 N. W. Rep. 87; Chase v. Dearborn, 21 Wis. 57, 61; Walden v. Bodley, 14 Pet. (U. S.) 156, 10 Law Ed. 398; Hacket v. Marmet, 52 Fed. Rep. 268, 3 C. C. A. 76, 8 U. S. App. 149; Pengra v. Munz, 29 Fed. Rep. 830; Cooke v. Loxley, 5 T. R. 4, 2 R. R. 521; Delaney v. Fox, 26 L. J. C. P. 248, 2 C. B. (N. S.) 768; Mayor, etc., Poole v. Whitt, 18 M. & W. 571, 16 L. J. Ex. 229; Doe d. Higginbotham v. Barton, 11 Ad. & El. 307.

deny the landlord's title though it shall appear by the evidence offered by the landlord that he has no title. If the tenant has had the use of the premises for the term it is no defense that when sued for the rent or for the use and occupation the testimony of the landlord fails to show a valid title in him when the lease was executed. Having received the consideration for his covenant to pay rent the tenant cannot refuse to pay for what he has enjoyed merely because the landlord fails to prove his title.<sup>2</sup>

**§ 551. Necessity for the surrender of the possession by the tenant.** A tenant who has entered into possession under a lease cannot deny the landlord's title, even for mistake or fraud in the execution or procurement of the lease unless he shall first surrender possession. Having obtained and enjoyed the possession under a lease whose validity depends upon his lessor's title, he cannot deny such title until he shall restore to his lessor what he has acquired by the lease. He must place the landlord in *statu quo*. He cannot at the same time repudiate the relationship of landlord and tenant and retain the benefits which have been conferred upon him by the creation of that relationship.<sup>3</sup> A tenant who is in possession when he exe-

<sup>2</sup> Barwick v. Thompson, 7 T. R. 488; Dolby v. Iles, 11 Ad. & E. 335; Russell v. Fabyan, 27 N. H. 529, 537.

<sup>3</sup> Davis v. Williams (Ala. 1901), 30 So. Rep. 488; Russell v. Irwin's Admir., 38 Ala. 44; Rogers v. Boynton, 57 Ala. 501; Hughes v. Watt, 28 Ark. 153; Bullard v. Hudson (Ga. 1906), 54 S. E. Rep. 132; McKissick v. Ashby, 98 Cal. 422, 33 Pac. Rep. 729; Tilghman v. Little, 13 Ill. 239; Ragor v. McKay, 44 Ill. App. 79; Pence v. Williams, 14 Ind. App. 86, 42 N. E. Rep. 494; Barkman v. Barkman, 107 Ill. App. 332; Saunders v. Moore, 14 Bush (Ky.) 97; Towne v. Butterfield, 97 Mass. 105; Ryerson v. Eldred, 18 Mich. 12; Bertram v. Cook, 32 Mich. 518; Perkins v. Potts, 52 Neb. 110, 72 N. W. Rep. 1017; Mattis v. Robinson, 1 Neb. 3; Allen v. Hall, 61 Neb. 256, 89 N. W. Rep. 803; Pate v. Turner, 94 N. Car. 47; Bonds v. Smith, 106 N. C. 553, 11 S. E. Rep. 322; Hagar v. Wikoff, 2 Okl. 580; Kiernan v. Terry, 26 Oreg. 464, 494, 38 Pac. Rep. 671; Lebanon School Dist. v. Lebanon Seminary (Pa.), 12 Atl. Rep. 857; Porter v. Mayfield, 21 Pa. St. 263; Mehr v. Krewzberg, 187 Pa. St. 53, 40 Atl. Rep. 810; Milhouse v. Patrick, 6 Rich. (S. Car.) Law, 350; Phillips Lessee v. Robertson, 65 Hayw. (Tenn.) 101; Wilson v. Smith, 5 Yerg. (Tenn.) 379; Greeno v. Munson, 9 Vt. 37, 31 Am. Dec. 605. As to tenants in possession when the lease was made see Franklin v. Merida, 35 Cal. 558, 95 Am. Dec.

cutes a lease or when he attorns may deny the title of the landlord where the relationship of landlord and tenant is the result of fraud, mutual mistake of law or fact, or misrepresentation. His remaining in possession cannot then work any injury to the landlord for the tenant did not acquire possession under the lease but by reason of some other claim upon or interest in the land. And the surrender of possession which is required must be an actual re-vesting of the possession in the landlord and not a mere pretext having for its purpose the injury of the lessor and his title.<sup>4</sup> A mere offer to surrender the lease,<sup>5</sup> a surrender of a portion of the demised premises by a tenant holding over,<sup>6</sup> or a notice by the tenant that he is about to terminate the tenancy,<sup>7</sup> or a fraudulent surrender of any sort,<sup>8</sup> will not be sufficient as a surrender to enable the tenant to dispute the title of the landlord. The tenant may after the term has expired and he has surrendered the possession, deny his landlord's title whether he entered under the lease or not.<sup>9</sup>

**§ 552. When the surrender of the premises by the tenant is unnecessary.** Where a tenant, being in possession of land at the time he leases it, afterwards discovers that the lease was obtained by fraud or misrepresentation of the landlord as to his title, or by the mutual mistake of the parties, he may, without surrendering possession, dispute and deny the title of the latter.<sup>10</sup> The tenant may show that, being himself in possession of

129; *Peralta v. Ginochio*, 47 Cal. 459; *Davidson v. Ellmaker*, 84 Cal. 21, 23 Pac. Rep. 1026. See also *Richardson v. Harvey*, 37 Ga. 224; *Cuthbertson v. Irving*, 6 Hun, 135, 29 L. J. Ex. 485, 6 Jur. (N. S.) 1211, 3 L. T. 335, 8 W. R. 704.

<sup>4</sup> *Gregory v. Doidge*, 3 Bing. 474; *Rogers v. Pitcher*, 6 Taunt. 202; *Hopcroft v. Keys*, 9 Bing. 613; *Grosvenor v. Woodhouse*, 1 Bing. 38; *Tenner v. Diplock*, 2 Bing. 10; *Cornish v. Searell*, 8 B. & C. 471; *Claridge v. MacKenzie*, 4 M. & G. 143.

<sup>5</sup> *Mackin v. Haven*, 187 Ill. 484, 58 N. E. Rep. 448.

<sup>6</sup> *Longfellow v. Longfellow* 54 Me. 240.

<sup>7</sup> *Longfellow v. Longfellow*, 54 Me. 240.

<sup>8</sup> *Littleton v. Clayton*, 77 Ala. 571; *Graham v. Moore*, 4 S. & R. (Pa.) 467.

<sup>9</sup> *Shelton v. Esluva*, 6 Ala. 230; *Smith v. Mundy*, 18 Ala. 182, 52 Am. Dec. 221; *Tewksbury v. Magraff*, 33 Cal. 237; *Merwin v. Camp*, 3 Conn. 35; *Camp v. Camp*, 5 Conn. 291, 13 Am. Dec. 60; *Carpenter v. Thompson*, 3 N. H. 204, 14 Am. Dec. 348; *Page v. Kinsman*, 43 N. H. 328; *Wild's Lessee v. Serpell*, 10 Gratt. (Va.) 405.

<sup>10</sup> *Miller v. Bonsadon*, 9 Ala. 317; *Farris v. Houston*, 74 Ala. 162; *Tison v. Yawn*, 15 Ga. 491, 60 Am. Dec. 708; *Tewsbury v.*

the land he accepted a lease of it from his landlord believing the latter to have a good title and in ignorance of the fact that he himself or some other person had a better title than the landlord.<sup>11</sup> A mistake of fact as to the person who has the title when the lease is executed always removes the estoppel. Hence, where one is possession leases by parol or by a writing not under seal from another not in possession under a mistake of fact he is not subsequently estopped as against the so-called landlord to deny the latter's title and showing that title was in himself,<sup>12</sup> and that the lease was therefore without consideration. But where a lessee, not being the occupant of land, accepts a lease and enters into possession thereunder, though he is estopped from denying his landlord's title while in possession, he may surrender and show that the lease was obtained by fraud, misrepresentation or mistake.<sup>13</sup>

**§ 553. The tenant not having received possession is not estopped.** While the signing of a lease by a lessee to which the lessor has also affixed his name may constitute an admission by

Magraff, 33 Cal. 237; Davis v. McGrew, 82 Cal. 135, 23 Pac. Rep. 41; Ball v. Lively, 2 J. J. Marsh. (Ky.) 181; Michigan Cent. R. Co. v. Bullard, 120 Mich. 416, 79 N. W. Rep. 635; Fuller v. Sweet, 30 Mich. 237; Clary v. O'Shea, 72 Minn. 105, 75 N. W. Rep. 115; Crockett v. Althouse, 35 Mo. App. 404, 410; Parrott v. Hungelbuerger, 9 Mont. 526, 24 Pac. Rep. 4; Jackson v. Harper, 5 Wend. (N. Y.) 246; Glein v. Rise, 6 Watts (Pa.) 44; Baskin v. Sechrist, 6 Pa. St. 497; Givens v. Mullinax, 4 Rich. (S. Car.) Law, 590, 55 Am. 706; Alderson v. Miller, 15 Gratt. (Va.) 279.

<sup>11</sup> Cain v. Gimon, 36 Ala. 168; Pearce v. Nix, 34 Ala. 183; Farris v. Houston, 74 Ala. 162; Pettersen v. Sweet, 13 Ill. App. 255; Washington v. Conrad, 2 Humph. (Tenn.) 562; Swift v. Dean, 11 Vt. 323, 34 Am. Dec. 693; De Wolf

v. Martin, 12 R. I. 535; Hammons v. McClure, 85 Tenn. 65, 2 S. W. Rep. 37; Swift v. Dean, 11 Vt. 323; Voss v. King, 38 W. Va. 607, 18 S. E. Rep. 762.

<sup>12</sup> Michigan Cent. R. Co. v. Bullard, 120 Mich. 416, 79 N. W. Rep. 635; Fuller v. Sweet, 30 Mich. 237. In Georgia it has been held the estoppel is applicable if the tenant, who when the lease was made, was in possession and claimed adversely. Johnson v. Thrower, 117 Ga. 1007, 44 S. E. Rep. 946. See also Sage v. Halversen, 72 Minn. 294, 75 N. W. Rep. 229, where the same rule is held.

<sup>13</sup> Russell v. Erwin, 38 Ala. 44, 50; Tilghman v. Little, 13 Ill. 239; Lowe v. Emerson, 48 Ill. 160, 164; Brown v. Keller, 33 Ill. 151, 155; Longfellow v. Longfellow, 61 Me. 590; Moshier v. Reding, 12 Me. 478; Mays v. Dwight, 82 Pa. St. 462.

the lessee that the lessor had a title if the lessee goes into possession under the lease, yet the lessee under such circumstances where he has not gone into possession under the written lease is not estopped to deny his landlord's title. In the case of a written lease with a failure on the part of the landlord to deliver possession to the tenant there arises such a failure of consideration as destroys the binding obligation of the lease. The mutuality of the lease having been extinguished, there is no longer any estoppel for an estoppel to be binding must be mutual.<sup>14</sup> A person who, having the possession of land under his own good title, becomes the tenant of and pays rent to a stranger is not estopped after his tenancy has determined from set-

<sup>14</sup> Chicago, etc., Co. v. Keegan, 152 Ill. 413, 39 N. E. Rep. 33, 35; District of Columbia v. Johnson, 1 Mackey (D. C.) 51; Fuller v. Sweet, 30 Mich. 237, 241; Gregory v. Doidge, 3 Bing. 474; Hopcroft v. Keys, 9 Bing. 613; Rogers v. Pitcher, 6 Taunt. 202; Doe d. Plevin v. Brown, 7 A. & E. 447; Gravenor v. Woodhouse, 1 Bing. 38; Fonner v. Diplock, 2 Bing. 10; Cornish v. Searell, 8 B. & C. 471; Claridge v. McKenzie, 4 M. & G. 143; Mountnoy v. Collier, 1 E. & B. 630; Cripps v. Blank, 9 D. & R. 480. "The only foundations for estoppels against lessees, that we have found any support for, arise out of indentures, whereby there is a mutual estoppel under seal, or from possession given, whereby an advantage is derived, by the tenant from the act of the landlord, which is peculiar, and which stands in law on a different footing from most other acts. Where a person in possession agrees by parol to pay money to a person out of possession, and who has no title, it is impossible to find any sensible ground for sustaining such

a promise which would not sustain any other promise made without consideration. Where there is an indenture, there is at common law, a presumed consideration. Where there is possession given, there is an actual consideration, which may render it reasonable enough under ordinary circumstances to require the landlord to be put in *statu quo*. But a person who never had or gave up possession, is left in *statu quo* by the tenant's remaining in possession, and in reason should have no further claim. If he has, it must be by some peculiar and unanimous rule, for which we have found no support. Such a relation, if valid at all, must rest on a valid contract, and the only consideration for the contract would be proof of title not covering merely the period of tenancy, but outlasting it. When that is proved, a right to possession is proved with it, and a further holding by the tenant would be wrongful, and subject him to eviction." By the court in Fuller v. Sweet, 30 Mich. 237, 240.

ting up his own prior title in ejectment brought by his lessor<sup>15</sup> before he has surrendered possession.

§ 554. **After an eviction there is no estoppel.** Inasmuch as the tenant's estoppel to deny his landlord's title is based upon his enjoyment of the possession, it is clear that a tenant, after he has been evicted by a title paramount to that of his landlord may deny his landlord's title. Necessarily he must do this where he has lost his possession by reason of the invalidity of or defect in the title upon which his possession was founded.<sup>16</sup> The rule by which the estoppel is created and upon which it is based is that so long as the tenant is in the enjoyment of the use and possession of the premises, he cannot deny the validity of the title from which alone all his rights are derived. If the landlord has given him all that his lease calls for him to give the tenant, i. e., an uninterrupted and secure possession and the tenant has accepted and enjoyed it, there can be no justice or fairness in permitting the tenant to avoid his liabilities on his covenants by showing that the foundation of his possession and enjoyment was weak and insufficient. Unless he has been actually injured by the defective title of his landlord he must keep all his agreements or surrender the possession. But where he has been ousted by a title paramount to his landlord's title there is a good and legal reason why he should be no longer estopped to show his landlord's title was insufficient because by reason of this insufficiency he has been deprived of the advantages of the lease and of the possession under it to which he had an absolute right. The tenant may, even where he is disturbed by one claiming a title paramount to that of the landlord, purchase the land from the claimant without the consent of the landlord even before he is ousted by a paramount title. If he does this he must surrender possession however for he will be estoppel to allege a title in himself so long as he continues in possession. But where he decides not to purchase a title and remains until he is practically ousted by one claiming title paramount to his landlord a surrender of possession to the landlord,

<sup>15</sup> Accidental D. Ins. Co. v. MacKenzie, 5 L. T. 20, 9 W. R. 783. Car. 177; Gilliam v. Moore, 44 N. Car. 95; Cuthbertson v. Irving,

<sup>16</sup> Farris v. Houston, 74 Ala. 162; Tewksbury v. Magraff, 33 Cal. 237; Clapp v. Coble, 21 N. 6 H. & N. 135, 29 L. J. Ex. 485, 6 Jur. (N. S.) 1211, 3 L. T. 335, 8 W. R. 704

being futile and valueless to the latter is not required of him. So a tenant who is threatened with an actual eviction by a purchaser under an execution against his landlord and who under the threat attorns to the purchaser may thereafter deny his landlord's title without surrendering possession of the premises.<sup>17</sup> Whenever it is ascertained by a competent judgment or decree, that the landlord's title is insufficient for the security of the tenant, the relation between them may be renounced, and the tenant may protect himself by taking shelter under a paramount title.

**§ 555. A lease obtained by fraud or mistake.** The rule which forbids a tenant from denying the title of his landlord does not apply where the tenant has been induced to accept a lease by fraud, duress, accident or mistake. The tenant may then show he has a title superior to his landlord or that a third party, under whom he claims title has a better title.<sup>18</sup> In order that the lessee may show a better title than that of his landlord, or that he may prove a good title in himself, he must show that he was in possession of the land as his own when the lease was made.

<sup>17</sup> Chambers v. Pleak, 6 Dana. (Ky.) 426, 429; Lunsford v. Turner, 5 J. J. Marsh. (Ky.) 104, 105; George v. Putney, 4 Cush. (Mass.) 351, 355. "Whenever it is ascertained by a competent judgment or decree, that the landlord's title is insufficient for the security of the tenant, the relation between them may be renounced, and the tenant may protect himself by taking shelter under a paramount title." By the court in Lunsford v. Turner, 5 J. J. Marsh. (Ky.) 105, 106.

<sup>18</sup> Miller v. Bonsadon, 9 Ala. 317; Cain v. Gimon, 36 Ala. 168; Farris v. Houston, 74 Ala. 162, Tewksbury v. Magraff, 33 Cal. 237; Young v. Heffernan, 67 Ill. App. 354; Carter v. Marshall, 72 Ill. 609; Harvin v. Blackman, 108 La. 426, 32 So. Rep. 452; People's Loan & Building Ass'n v. Whitmore, 75 Me. 117; Isaac's Lessee

v. Clarke, 2 Gill. (Md.) 1; Suddarth v. Robertson, 118 Mo. 286, 24 S. W. Rep. 151; Crockett v. Althouse, 35 Mo. App. 404; Wiggin v. Wiggin, 58 N. H. 235; Killoren v. Murtaugh, 64 N. H. 51, 5 Atl. Rep. 769; Bigler v. Furman, 58 Barb. (N. Y.) 545; People v. ex rel. Ainslie, Mowlett, 76 N. Y. 574, 576; Ingraham v. Baldwin, 9 N. Y. 45, 47; Miller v. McBrier, 14 S. & R. (Pa.) 382, 385; Hamilton's Lessee v. Marsden, 6 Binn. (Pa.) 45, 49; Brown v. Dysinger, 1 Rawle (Pa.) 408; Thayer v. Society, 20 Pa. St. 60; School District v. Long (Pa.), 10 Atl. Rep. 769; Jenckes v. Cook, 9 R. I. 520; Williams v. Wait, 2 S. D. 210, 218, 49 N. W. Rep. 209, 39 Am. St. Rep. 768; Hammons v. McClure, 85 Tenn. 65, 2 S. W. Rep. 37; Lakin v. Dolly, 53 Fed. Rep. 333; Derrick v. Luddy, 64 Vt. 462, 24 Atl. Rep. 1050.

He is then allowed to deny his landlord's title and to resist being ousted if he can show that, being in possession; he was induced to take a lease of his own land by duress, accident or mistake for the reason that the landlord, if he is defeated in such action, is in no worse condition than he was before the lease was made. The tenant must first show by satisfactory evidence that he accepted the lease by reason of a mistake of fact or of law or that he was induced to accept it by some fraud or misrepresentation on the part of the landlord. Thus, it may be relevant for the tenant to show that the landlord claimed that he owned the land and that if the tenant did not take a lease from him he would eject him or treat him as a trespasser. If, after having signed such a lease, the alleged tenant proved facts which would be sufficient in equity to entitle him to have the lease set aside as obtained by fraud or false representation the court will regard the lease as void; and, the relation of landlord and tenant not existing the occupant is in the same position toward the person claiming to be his landlord as he would be towards a stranger.<sup>19</sup> So, where a person being in possession under a claim of title is induced to accept a lease through the mutual mistake of the parties relating to the facts, he is not estopped from setting up a superior title as against his landlord where he was in possession of the premises when he made the lease.<sup>20</sup> A tenant whose lease is void for lack of consideration is not estopped to deny his landlord's title where he was in possession of the land before the lease was made. Thus, inasmuch as the mere parol promise of an occupant of land to pay rent is void, because it is without consideration, where it appears that the person to whom he has promised to pay has no title, the promisor is not estopped to show that fact.<sup>21</sup> So, one who takes up land as being abandoned or unclaimed is not thereby estopped to deny the title of the person to whom he has attorned because the person falsely

<sup>19</sup> In Alabama, under Code § 3389, a tenant holding over after his term has expired, cannot, in an action of unlawful detainer deny his landlord's title even though his lease were procured by the fraud of the landlord.

Nicrosi v. Phillippi, 91 Ala. 299, 8 So. Rep. 561.

<sup>20</sup> Berridge v. Glassey (Pa. 1887), 7 Atl. Rep. 749.

<sup>21</sup> Clary v. O'Shea, 72 Minn. 105, 75 N. W. Rep. 115; Fuller v. Sweet, 30 Mich. 237.

represented to him that he, and not the occupant, had the legal title to the land.<sup>22</sup> And as a general rule the payment of money in the character of rent procured or resulting from a mutual mistake or from misrepresentation, to a person who is not entitled to receive it does not preclude the payer from showing that the person to whom he paid it was not entitled to receive it.<sup>23</sup> In every case where a tenant is entitled to deny his landlord's title he must show that the lease was invalid and consequently, that the relationship of landlord and tenant did not exist. He must show by satisfactory evidence that the so-called lease is not and never was binding upon him as a lease. And the mere fact that the tenant has a better title than the landlord and that he was in possession when he made the lease does not alone entitle him to dispute his landlord's title unless he shall show that he was enticed into signing a lease by misrepresentation or fraud or by mutual mistake which would justify equity in setting it aside.<sup>24</sup> So, where by a mistake of law certain claimants of public land being in the occupation of the same, paid a nominal rent to the patentee thereof, they are not subsequently estopped to deny his title in an action of ejectment brought by the patentee against them. From this it may be inferred that a mistake of law as to the validity of the title will have the same effect as a mistake of fact.<sup>25</sup> A person who while in possession of land as owner made a deed to another, and then took from him a lease of the premises, agreeing to pay rent and to surrender the premises at the end of the term cannot controvert the landlord's title by showing he made the deed under menace and duress, without first impeaching the validity of the lease because of fraud. He must show in the first place either that he accepted the lease by mistake or under circumstances that would justify a court of equity in setting it aside.<sup>26</sup> The parties to a lease which is invalid because it is for an immoral or illegal purpose

<sup>22</sup> Hammons v. McClure, 85 Tenn. 65, 2 S. W. Rep. 37.

<sup>23</sup> Rogers v. Pitcher, 1 Marsh. 541, 6 Taunt. 202.

<sup>24</sup> Williams v. Wait, 2 S. D. 210, 219, 49 N. W. Rep. 209, 39 Am. St. Rep. 768; Ward v. Philadelphia (Pa.), 6 Atl. Rep. 263.

<sup>25</sup> Lakin v. Dolly, 53 Fed. Rep. 333; Abbott v. Cromartie, 72 N. Car. 292.

<sup>26</sup> Williams v. Wait, 2 S. D. 210, 49 N. W. Rep. 209, 39 Am. St. Rep. 768.

are not bound by the rule of estoppel. Where the purpose of the parties in making a lease is illegal in itself, or where the intention of the parties to the lease though apparently legal, is to accomplish something which they are forbidden to do by statute, law or by public policy, he estoppel does not apply. Thus, where one who has entered a homestead on public land leases the land to a person to whom he has agreed to sell it, intending thereby to avoid the statute forbidding the conveyance of public land before entry is complete, and the lessee has gone into possession and made valuable improvements on the land, he may prove, as against the lessor, the illegal transaction and fraudulent purpose of the parties and thus deny and defeat the title of the lessor.<sup>27</sup>

**§ 556. Misrepresentation by the lessor of his title.** As an exception to the rule that a tenant is not to be permitted to impeach or dispute the title of his landlord, it is well established that where the tenant is induced to accept the lease by a trick, or by a misrepresentation by the landlord that he has a good title, or by the use of undue promises or threats in connection with an assertion of title by the landlord, he may prove the trick, fraud or misrepresentation of the landlord and by so doing either directly or by implication assert a title superior to his landlord. This he may do even though at the time of the landlord's misrepresentation he was not in possession of the premises. With greater and stronger reason is the rule invoked when the tenant being in peaceable possession of the land is coerced or merely persuaded into attorning to one who has no right to the land by false representations coupled with threats of ousting him if he shall refuse to acknowledge the title.<sup>28</sup> It must be understood, however, that the acceptance of the lease was the result of some fraud actually practiced on the tenant by the landlord for the mere fact that the tenant when he takes

<sup>27</sup> *McKinnis v. Scottish American Mortg. Co.*, 55 Kan. 259, 39 Pac. Rep. 1018.

<sup>28</sup> *Baskin v. Seechrist*, 6 Pa. St. 154, 163; *Boyer v. Smith*, 3 Watts (Pa.) 449; *Hockenbury v. Snyder*, 2 Watts & S. (Pa.) 240; *Ward v. Philadelphia* (Pa.) 6 Atl. Rep. 263; *Thayer v. Society*, 20 Pa. St.

60; *Williams v. Wait*, 2 S. D. 210, 218, 49 N. W. Rep. 209, 39 Am. St. Rep. 768; *Anderson v. Miller*, 15 Gratt. (Va.) 279; *Locke v. Frasher*, 79 Va. 409, 412. See also *Tyler v. Davis*, 61 Tex. 754; *Henderson v. Miller*, 53 Mich. 590, 19 N. W. Rep. 197; *Hawes v. Shaw*, 100 Mass. 187.

a lease has a better title to the premises than his landlord raises no presumption of fraud on the part of the landlord.<sup>29</sup>

**§ 557. A tenant is not estopped as to a stranger.** Inasmuch as the estoppel which is binding upon the tenant and upon those who succeed him in interest is based solely upon the principle that it would be unjust to the landlord to permit the tenant to repudiate a title by which he has acquired and has been permitted to hold possession, it follows, therefore, that as to a stranger to the lease who is neither in the possession of the premises nor in privity with the landlord, there is no estoppel upon the tenant. In order that the estoppel shall operate there must be a contract which involves mutual relations between the parties to it. In order that an estoppel shall be binding on a person in the character of a tenant there must be a lease to which the landlord and tenant are the parties and to which all other persons are strangers. Now, as a general rule, a stranger to a contractual relation cannot set up an estoppel for the reason that every estoppel to be binding must be mutual, and hence the estoppel can operate only between the parties to the contract and those who are in privity with them. Hence, it follows that a tenant not being estopped as against a stranger may deny the stranger's title and assert adverse possession in his own favor as against a stranger to the contract of lease.<sup>30</sup> Thus, a tenant holding at first as a tenant and subsequently having repudiated his landlord's title holding in his own right was permitted to prove his adverse holding and to deny the landlord's title as against one holding title under a fraudulent and void deed from him while he was a tenant. Hence, from the above construction it follows that the relation of landlord and tenant must exist or at least must have existed in order that the estoppel under which the tenant is precluded from denying his landlord's title can be recognized. In every case where no tenancy is proved there is no estoppel.<sup>31</sup> So, where an occupant of land or of

<sup>29</sup> Thayer v. Society, 20 Pa. St. 103, 106, 11 Pac. Rep. 561; Merwin v. Camp, 3 Conn. 35; Shearer v. Winston, 33 Miss. 149, 152; Corrigan v. Riley, 26 N. J. Law, 79 82, 83; Davis v. Delaware & Hudson Canal Co., 109 N. Y. 47, 15 N. E. Rep. 873.

<sup>30</sup> Cole v. Maxfield, 13 Minn. 235, 243.

<sup>31</sup> Swift v. Goodrich, 70 Cal.

premises does not claim and has not claimed title under the owner nor in any way accepted him as a landlord or admitted that the owner is his landlord, the occupant is not estopped to deny the owner's title.<sup>32</sup> Merely calling an instrument under which the occupant of land is in possession a lease does not create such a relationship as will estop the occupant from denying the owner's title. For though an instrument under which an occupant holds land be called a lease by the parties to it the occupant is not estopped thereby if it appears that the instrument was not intended to operate as a lease and that hence it does not create the relation of landlord and tenant between the owner and the occupant.<sup>33</sup> So, if the occupant of land is in fact merely a bailiff or agent of the owner, the true relationship of the parties may be shown and the occupant may dispute his employer's ownership though he was in possession under what was apparently a written lease.<sup>34</sup> And inasmuch as the relation of landlord and tenant does not exist between tenants in common the rule of estoppel is not applicable to an agreement between tenants in common setting off to one another particular portions of the premises which they are to enjoy separately.<sup>35</sup>

**§ 558. No estoppel where leases are illegal or contrary to public policy.** The rule that a tenant is estopped to deny or to dispute the title of his landlord to the demised premises does not apply to a case where by an express statute the leasing of the demised premises has been forbidden or to a case where the leasing of the premises is contrary to good morals or to some rule of public policy. So, where congress by an express statute had forbidden the settlement of certain public lands by anyone, a lessee of a person who was himself a mere squatter upon public land, may show that his landlord's title is invalid because he had never acquired any valid title to the premises on account of the prohibition of the federal statute.<sup>36</sup> So, where a person usurps the right to keep a public ferry in violation of the stat-

<sup>32</sup> Davis v. Del. & Hud. Canal Co., 14 N. Y. S. R. 38, 109 N. Y. 47, 51, 15 N. E. Rep. 873, 28 Week. Dig. 174, 4 Am. St. Rep. 418.

<sup>33</sup> Croade v. Ingraham, 13 Pick. (Mass.) 33.

<sup>34</sup> Oriental Investment Co. v.

Barclay (Tex. Civ. App.), 64 S. W. Rep. 80.

<sup>35</sup> Corrigan v. Riley, 26 N. J. L. 79, 84.

<sup>36</sup> Arkansas Hot Springs Cases, 92 U. S. 698. See also Goode v. Gaines, 145 U. S. 141, 12 Sup. Ct. 839, 36 Lew ed. 654.

ute and leases this right to another, the latter is not estopped to show the usurpation and by this prove that the landlord had no title.<sup>37</sup> The tenant may also show, as against the landlord, that the demised premises were a part of the public domain and that he, the tenant, had taken the land by pre-emption prior to his landlord.<sup>38</sup> So, also, where a lease by a pre-emptor of public lands for ninety-nine years is really a device to avoid the effect of the statute prohibiting a conveyance of the land by him, the lessee may show during the term that his landlord never had made a final entry and consequently that he had no legal title to the land under the statute.<sup>39</sup> So, where a grant was made to an Indian under a statute of the federal congress which expressly forbade him to sell or convey land excepting that he might lease it for a short period, but he conveyed the land in fee and took a lease from his grantee, it was held that the tenant was not estopped to show the invalidity of his own conveyance and that after his death his devisees and their assignees might dispute the title of the landlord and that they too were not estopped by his acceptance of the lease.<sup>40</sup> A tenant who has leased lands which are situated in the bed of a navigable river or in tidal waters on the sea shore cannot deny his landlord's title while he is in possession though the landlord had no right to make the lease because the bed of the stream or the land under water is owned by the state or federal government. If, as would doubtless be true in such case, any structure which the lessor or lessee might have erected upon the land would be a nuisance it would be a public nuisance merely so that as long as the public acquiesces the lessee cannot set up an illegal appropriation of the public domain by the lessor as a defense in an action for rent or in any action upon the covenants of the lease. He cannot abate the nuisance, either directly or indirectly, nor should he be permitted, by an allegation that the structure which he holds under lease is a nuisance to deny the title of his landlord. Whether the landlord's possession be or be not lawful cannot be determined in an action between the landlord and the tenant in possession.<sup>41</sup>

<sup>37</sup> Milton v. Hayden, 32 Ala. 30.

<sup>39</sup> Bower v. Higbie, 9 Mo. 256.

<sup>38</sup> Welder v. McComb, 10 Tex. Civ. App. 85, 91, 30 S. W. Rep. 822.

<sup>40</sup> Smythe v. Henry, 41 Fed. Rep. 705.

<sup>41</sup> St. Anthony Falls Water Co.

**§ 559. The tenant may show the expiration of the landlord's title.** The rule that a tenant is estopped to deny his landlord's title applies only to the title which he had at the beginning of the tenancy.<sup>42</sup> The estoppel of the tenant does not prevent him from showing that the landlord's title has been extinguished since his lease was executed. He may show against his landlord that the title of the latter has terminated by its original limitation, or by the landlord having conveyed the premises or by the title having been extinguished by a sale under a judgment or by operation of law.<sup>43</sup> So far as the estoppel of a tenant to deny the title of his landlord is an estoppel *in pais* arising out of his having entered into possession under the title of the landlord existing at the beginning of the lease this seeming exception is more apparent than real for the tenant does not deny

v. Morrison, 12 Minn. 249, 254; Hall v. Paulson Furniture Co., 4 Wash. 644, 649, 30 Pac. Rep. 665; Clancy v. Rice, 5 Wash. 571, 31 Pac. Rep. 971; Columbia, etc., Co. v. Braillard, 5 Wash. 492, 32 Pac. Rep. 226.

<sup>42</sup> Sadler v. Jefferson, 143 Ala. 669, 39 So. Rep. 380.

<sup>43</sup> Hammond v. Blue, 132 Ala. 337, 31 So. Rep. 357; Randolph v. Carlton, 8 Ala. 606, 614; Otis v. McMillen, 70 Ala. 46; Farris v. Houston, 74 Ala. 162, 168; Wheeler v. Warschauer, 21 Cal. 309, 311; McDewitt v. Sullivan, 8 Cal. 592, 596; Robertson v. Biddell, 32 Fla. 304, 13 So. Rep. 358; Winn v. Strickland, 34 Fla. 610, 16 So. Rep. 606; Tilghman v. Little, 13 Ill. 239; St. John v. Quitzow, 72 Ill. 334; Wells v. Mason, 5 Ill. 84; Kinney v. Lamon, 8 Blackf. (Ind.) 350; Johnson v. Woodbury, 63 Kan. 880, 64 Pac. Rep. 1030; Smith v. Cooper, 39 Kan. 446, 16 Pac. Rep. 958; Casey v. Gregory, 13 B. Mon. (Ky.) 505, 56 Am. Dec. 581; Gregory's Heirs v. Crab's Heirs, 2 B. Mon. (Ky.) 234; Smith v. Scanlon, 21 Ky. L.

Rep. 169, 51 S. W. Rep. 152; Giles v. Ebsworth, 10 Md. 333, 344; Lamson v. Clarkson, 113 Mass. 348, 349, 18 Am. Rep. 489; Sherman v. Fisher, 11 Detroit (Mich.) Leg. N. 589, 101 N. W. Rep. 572; McGuffie v. Carter, 42 Mich. 497, 4 N. W. Rep. 211; Wolf v. Johnson, 3 Miss. 513, 515; Rhyme v. Guevara, 67 Miss. 139, 6 So. Rep. 736; Chaffin v. Brockmeyer, 33 Mo. App. 92; Stagg v. Eureka T. & Cr. Co., 56 Mo. 317; Robinson v. Troup. Min. Co., 55 Mo. App. 662; McAusland v. Pundt, 1 Neb. 211, 93 Am. Dec. 358; Pentz v. Keuster, 41 Mo. 447, 451; Russell v. Allard, 18 N. H. 222, 225; Howell v. Ashmore, 22 N. J. Law, 261, 265; Horner v. Leeds, 25 N. J. Law, 106, 115; Hoag v. Hoag, 35 N. Y. 469, 471; Lane v. Young, 66 Hun, 563, 21 N. Y. Supp. 838, 50 N. Y. S. Rep. 623; Jackson v. Davis, 5 Cow. (N. Y.) 123, 134; Jackson v. Rowland, 6 Wend. (N. Y.) 666, 671, 22 Am. Dec. 557; Bigler v. Furman, 58 Barb. (N. Y.) 555; Devacht's Lessee v. Newsam, 3 Ohio, 57.

the title under which he entered. On the contrary, he tacitly admits the validity of the landlord's title existing when he entered by offering to prove that since his entry this title has been extinguished. So far as the estoppel is based upon a lease under seal it is based upon an indenture by which both parties are bound. It must therefore be mutual and when the obligation ceases to be mutual the estoppel is also at an end. The lessee by indenture cannot deny that the lessor, whom he has contracted with on the basis of ownership had a good title when the lease was executed. He can always show what the quantity and character of the title of the lessor was and that it expired during the term for by its expiration, the tenant's right to possession is also at an end. The tenant by the written lease covenants to pay rent which implies a covenant by the landlord to keep him in possession, and, if the landlord, either by his own action or by the operation of law, is placed in such a position that he can no longer secure the tenant in his possession, there is a failure on his part to keep the covenant which is implied or inserted in every lease by indenture which releases the tenant from his obligation to pay rent under his covenant and from the operation of the estoppel.<sup>44</sup> Thus in an action brought

<sup>44</sup> *Lamson v. Clarkson*, 113 Mass. 348, 349, 18 Am. Rep. 498. "But can the principle be so extended as to estop the tenant from denying the validity of a subsequent assignment of the lease, or of the rights required by such assignment? Such rights could have had no existence when he took possession. The tenant can be estopped from denying only what he has once admitted. To test this, suppose two parties claim the reversion under conflicting assignments, in whose favor is the tenant estopped? In a contest with one assignee may he not protect himself by showing that the true right is in the other? There can be but one answer to this. Again suppose a landlord dies during the tenancy, the tenant, in a contest with the heir, cannot dispute

the title in the ancestor, but he may show a devise to a third person. Were it otherwise, the tenant would be at the mercy of both her heir and devisee. He could defend himself against neither. The distinction is stated and was adopted in *Jackson v. Rowland*, 6 Wend. 670. The court there say: "But it is said the defendant, being a tenant of the lessor, is not permitted to avail himself of this outstanding title. A tenant cannot dispute the title of his landlord, so long as it remains as it was at the time of the tenancy commenced, but he may show that the title under which he entered has expired or had been extinguished." By the court by Selden J. in *Despard v. Wallbridge*, 15 N. Y. 374 on page 377.

by a landlord for rent, the tenant may allege and prove that the landlord has conveyed the demised premises to the tenant,<sup>45</sup> or to a third person and that he has paid rent to such third person.<sup>46</sup> And the fact that the tenant by mistake paid rent to his former landlord after the title of the latter had terminated does not prevent him thereafter from showing that the title had terminated.<sup>47</sup> So, as against the landlord's heir, the tenant may show in an action for rent that the title expired after the tenant took possession as when it was extinguished in the life time of the ancestor.<sup>48</sup> A yearly tenant who has occupied during the whole term may show that his lessee was merely a tenant *per autre vie* and that the life of the other has expired during the term.<sup>49</sup> The tenant may show that the premises which he has leased have been sold under the foreclosure of the mortgage and that he attorned to the purchaser at the foreclosure sale.<sup>50</sup> He may also show that the land was sold under a foreclosure where he himself was the mortgagee and he may show that he became the purchaser at the sale. The tenant may show that the landlord's title has been foreclosed and the property sold under a second mortgage where the landlord had acquired his title by a sale under the foreclosure of his first mortgage and had omitted in that foreclosure to make the second mortgagee a party defendant.<sup>51</sup> So, the tenant may show that during the term the land has been sold under an execution issue on a judgment,<sup>52</sup> and he may show that the land has been sold for taxes and that he, himself has bought it at the tax sale.

<sup>45</sup> Wade v. South Penn. Oil Co., 45 W. Va. 390, 32 S. E. Rep. 169.

<sup>46</sup> Rhyne v. Guevara, 67 Miss. 139, 6 So. Rep. 736; West Shore Mills Co. v. Edwards, 24 Oreg. 475,

33 Pac. Rep. 987.

<sup>47</sup> Randolph v. Carlton, 8 Ala. 606; McDewitt v. Sullivan, 8 Cal. 592, 596; Robinson v. Troupe Min. Co., 55 Mo. App. 662.

<sup>48</sup> Lane v. Young, 21 N. Y. Supp. 838, 66 Hun, 563, 50 N. Y. S. R. 623. In West Virginia it seems that the forfeiture of the landlord's title for non-payment of taxes during the tenancy cannot

be shown unless the tenant has disclaimed or held adversely for more than three years. Voss v. King, 38 W. Va. 607, 18 S. E. Rep. 762.

<sup>49</sup> Lamson v. Clarkson, 113 Mass. 348, 349, 18 Am. Dec. 498.

<sup>50</sup> Shields v. Lozeear, 34 N. J. Law, 496.

<sup>51</sup> Walker v. Fisher, 117 Mich. 72, 75, N. W. Rep. 144.

<sup>52</sup> Doe v. Ashman, 22 N. J. Law, 261. "So long as a tenant is not expelled, he has in general, no right to question his landlord's title. He cannot deny that he had

§ 560. In what actions the estoppel may be pleaded. The estoppel which is binding on the tenant may be pleaded in any action brought by the landlord or against anyone in privity with the tenant where the cause of action is based upon or arises out of the relationship of landlord and tenant. It is always available in actions brought by the landlord upon the tenant's covenants and is by no means confined to such actions as will be subsequently explained. Thus the estoppel will apply in an action brought by the landlord to recover the rent whether brought against the tenant himself or against his assignee,<sup>53</sup> unless of course the tenant has been evicted by a paramount title in which case he is not estopped to plead the eviction and to show title in another than his landlord. The estoppel will also apply in an action on a promissory note given by a tenant for rent,<sup>54</sup> and

a right to demise at the time of the lease. He cannot defend on the ground that he has acquired an outstanding title adverse to that of the landlord. But I am not aware that the estoppel goes farther. If the landlord part with his title, the duty of the tenant, including that of paying rent, is due to the assignee and should the tenant buy in the assignee's right the lease would be extinguished. So if the landlord sell and release to the lessee. In these cases no action would lie for the rent. Therefore, had there been a sheriff's sale of the whole reversion of the demised premises, and the defendant had redeemed or purchased under the judgment, no action could have been sustained; for a purchase or acquisition of title under a judgment against the lessor, is the same thing as if he had granted by deed. It is, to be sure, acquiring title indirectly, and by operation of law, from the lessor; but it comes through his act and consent, or his neglect, and is therefore the same in legal effect as if

he had granted or demised the reversion." *Nellis v. Lathrop*, 22 Wend. (N. Y.) 121.

<sup>53</sup> *Lataillade v. Santa Barbara Gas Co.*, 58 Cal. 4; *Ashton v. Golden Gate Lumber Co.* (Cal. 1899), 58 Pac. Rep. 1; *Hochenauer v. Hildebrant*, 6 Colo. App. 199, 40 Pac. Rep. 470; *Bartlett v. Robinson*, 52 Neb. 715, 72 N. W. Rep. 1053; *Lambert v. Huber*, 50 N. Y. Supp. 793, 22 Misc. Rep. 462; *Clark v. Aldrich*, 40 N. Y. Supp. 440, 4 App. Div. 523; *Kiernan v. Terry*, 26 Oreg. 494, 38 Pac. Rep. 671; *School District of City of Harrisburg v. Long* (Pa. 1887), 10 Atl. Rep. 869; *Williams v. Wait*, 2 S. D. 210, 49 N. W. Rep. 209, 39 Am. St. Rep. 768; *Crampton v. Van Ness*, 6 Fed. Cases, No. 3,348, 4 Cranch. C. C. 350; *Cunning v. Tittabawasee Boom Co.*, 88 Mich. 237, 50 N. W. Rep. 141.

<sup>54</sup> *Life v. Sechrest*, 1 Ind. 512. In such an action the defendant will be estopped to show that the wife of the maker had conveyed the land to the landlord for the purpose of defrauding her creditors. This is not at all material

to an action on a bond executed by a third person to secure the payment of rent.<sup>55</sup> In an action of ejectment by the landlord upon the forfeiture of the lease by the tenant, the latter is estopped to deny the former's title.<sup>56</sup> So, also, where on the tenant holding over, the landlord takes summary proceedings, as, for example, in an action of forcible entry and detainer, the tenant is estopped.<sup>57</sup> And the estoppel is binding on the tenant in an action of trespass brought against him by his landlord<sup>57a</sup> and to an action for unlawful detainer by the landlord.<sup>58</sup> If the owner in an action for use and occupation proves that the relationship of landlord and tenant existed between him and the defendant, the latter is estopped to deny the former's title.<sup>59</sup> Though if the owner fail to prove this relationship, the defendant may prove that he occupied the land under the title of a third person.<sup>60</sup> In an action by a landlord to enforce his lien for rent on the crops of a tenant in the possession of a third person, the latter cannot deny the landlord's title to the land. The landlord's title cannot be inquired into for his lien does not depend upon the validity of the title but upon the existence of the relation of landlord and tenant. He might have been the

as regards the creditors of the tenant and the maker of the note being the tenant cannot dispute his landlord's title. *Palmer v. Nelson*, 76 Ga. 803.

<sup>55</sup> *Perkins v. Governor, Minor (Ala.)* 352.

<sup>56</sup> *Congregational Society in Newport v. Walker*, 18 Vt. 600.

<sup>57</sup> *Nicrosi v. Phillipi*, 91 Ala. 299, 8 So. Rep. 561; *Davis v. Pou*, 108 Ala. 443, 19 So. Rep. 362; *Eckles v. Booco*, 11 Colo. 522, 19 So. Rep. 465; *McLean v. Spratt*, 20 Fla. 515; *Settle v. Henson, Morris (Iowa)* 111.

<sup>57a</sup> *Delany v. Fox*, 2 C. B. (N.S.) 768, 26 L. J. C. P. 248.

<sup>58</sup> *Anderson v. Anderson*, 104 Ala. 428, 16 So. Rep. 14; *Peterson v. Kinkead*, 92 Cal. 372, 28 Pac. Rep. 568; *Emerick v. Tavener*, 9 Gratt. (Va.) 220, 58 Am. Dec. 217; *Voss v. King*, 33 W. Va. 236, 10

S. E. Rep. 402; *Thomas v. Sass (Ind. Ter.)*, 64 S. W. Rep. 531. An answer in unlawful detainer, alleging that the plaintiff has no interest in the lands in question may be demurred to under the rule of the text. *Rogers v. Hill (Ind. Ter.)*, 64 S. W. Rep. 536.

<sup>59</sup> *Codman v. Jenkins*, 14 Mass. 93; *Binney v. Chapman*, 5 Pick. (Mass.) 124; *Cobb v. Arnold*, 8 Met. (Mass.) 398.

<sup>60</sup> *Buell v. Cook*, 4 Conn. 238. If the tenant denies that he holds under an agreement permitting him to hold over, it may be proper for the court to receive evidence of title in a third person and subsequently to reject it if the alleged agreement is not shown to the satisfaction of the court. *Knowles v. Inman*, 16 Colo. 385, 26 Pac. Rep. 823.

landlord though he had no title and if the tenant has enjoyed possession and owes rent, the landlord's lien cannot be attacked by a stranger to the lease to whom the tenant has conveyed the crop.<sup>61</sup> A tenant of a purchaser at a tax sale who is also assignee of a vendor's lien on the land may, in an action to enforce his lien, deny the tax title under which his lessor claims, where he has taken a lease from a receiver appointed by the court, as he thus has become a tenant of the court.<sup>62</sup>

§ 561. **To what matters the estoppel extends.** By the operation of the estoppel of the tenant to deny his landlord's title, evidence of any matter of fact which shows or tends to show directly or indirectly that the title under which the tenant enjoys possession is invalid, is excluded. The tenant is estopped to show that his landlord is not the sole owner of the premises,<sup>63</sup> or to show that the premises occupied by him as tenant do not correspond in boundaries with the description in the lease.<sup>64</sup> Where the tenant has taken a lease from two lessors jointly and paid them rent jointly, he is estopped in a joint suit by them against him for the rent to prove that they were owners in severalty.<sup>65</sup> An occupant of land who, while in possession of land takes a lease from a person claiming adversely to his lessor, is estopped thereafter to deny the title of such claimant.<sup>66</sup> Thus a lessee of land who, as soon as he hears that the land is claimed adversely as against his lessor, accepts a lease from the claimant is subsequently in an action brought by the claimant, estopped to deny his title.<sup>67</sup> If by taking the second lease he is permitted to remain in undisturbed possession, he must surrender the possession to the second lessor before he can deny the title of the latter.<sup>68</sup> So, also, as the estoppel is mutual, the landlord will be estopped to assert any fact which is inconsistent with his previous attitude toward the tenant. Thus, the owner of the premises who has authorized a lease to be made and has received rent on account of the lease, will be estopped to as-

<sup>61</sup> Kelly v. Eyster, 102 Ala. 325, 330, 14 So. Rep. 657.

<sup>62</sup> DeCoursey v. DeCoursey, (Ky.) 64 S. W. Rep. 912.

<sup>63</sup> Clark v. Aldrich, 40 N. Y. Supp. 440, 4 App. Div. 523.

<sup>64</sup> Outtoun v. Dulin, 72 Md. 536, 20 Atl. Rep. 134.

<sup>65</sup> Cantwell v. Moore, 44 Ill. App. 656.

<sup>66</sup> Sturges v. Van Orden, 75 N. Y. Supp. 1007, 37 Misc. Rep. 499.

<sup>67</sup> Hamilton v. Pittock, 158 Pa. St. 457, 27 Atl. Rep. 1079.

<sup>68</sup> Piper v. Cashell, 122 Fed. Rep. 614.

sert that the person who executed it for him was not authorized to do so.<sup>69</sup> So, also, the landlord's estoppel may be invoked against him to show that the title to fixtures is in the tenant. Thus, where the landlord in the presence of another creditor of the tenant, permitted the latter to receive a chattel mortgage on certain fixtures which were placed on the premises by the tenant, the landlord cannot subsequently claim that he owned the fixtures.<sup>70</sup>

**§ 562. The estoppel is applicable to a tenancy at will.** The estoppel of the tenant to deny his landlord's title applies to a tenancy at will or at sufferance as well as to a tenancy for a fixed term.<sup>71</sup> So, where a vendee enters upon and occupies land under a contract to purchase it he cannot deny the title of his vendor while he continues in possession at least in those jurisdictions where he is assumed to be a tenant at will of the vendor when he enters on land prior to taking title.<sup>72</sup>

**§ 563. In whose favor the estoppel will operate.** The estoppel of the tenant to deny the title of his landlord will operate in favor of all persons who are in privity of contract or of estate with the landlord during the possession of the tenant. Thus

<sup>69</sup> Niles v. Gonzales (Cal. 1906), 82 Pac. Rep. 212.

<sup>70</sup> Conde v. Lee, 55 App. Div. 401, 67 N. Y. Supp. 157, affirmed in 171 N. Y. 662, 64 N. E. Rep. 1119. In Pennsylvania the question of estoppel recently arose under circumstances involving a lease for a term of 2,000 years, certainly a long term and perhaps without parallel in the American cases. The land had been leased for a term of 2,000 years in the year 1642. Subsequently to this for a period of about 145 years all parties in dealing with the land and in conveying and devising it treated as a term for 2,000 years. Thereafter and in the year 1823 the land was allotted to the tenants in fee simple and following this allotment for a period of sixty years the persons to whom it had been allotted conveyed it as

though they were the owners in fee and during this time there was a continuous adverse possession against all the world. One of the owners in fee mortgaged the land and it was sold under a foreclosure of the mortgage and the court held that the purchaser under the foreclosure held an absolute title to the fee as against a purchaser of the unexpired term of the lease at a sheriff's sale. Townsend v. Boyd, 217 Pa. St. 386, 66 Atl. Rep. 1099.

<sup>71</sup> Towne v. Butterfield, 97 Mass. 105; Falkner v. Beers, 2 Doug. (Mich.) 117, 120; Griffin v. Sheffield, 38 Miss. 359, 77 Am. Dec. 646 (tenancy at sufferance); Ezelle v. Parker, 41 Miss. 520; Chattele v. Pound, 1 Ld. Raym. 746.

<sup>72</sup> Dowd v. Gilchrist, 46 N. Car. 453. See also Winward v. Robbins, 3 Humph. (Tenn.) 614.

it will operate in favor of any person to whom during the tenant's possession the landlord has conveyed the reversion.<sup>73</sup> It will also operate in favor of the landlord's heirs,<sup>74</sup> and devisee as well as in favor of one to whom the landlord has assigned his interest in the lease separately from the reversion.<sup>75</sup> So, where a statute confers upon the administrator of a deceased landlord the same right to sue for a breach of the lease, as the landlord possessed, the tenant is estopped to question the landlord's title in an action brought against him by the administrator.<sup>76</sup> The estoppel will also operate in favor of the agent of the owner who leased the land in his own name and the tenant cannot dispute the agent's title to the land though it is clear he never owned the fee.<sup>77</sup> In an action for the rent by a landlord, a tenant is estopped to deny that the plaintiff is entitled to receive it though the premises were the property of the wife of the plaintiff and the plaintiff is not suing as her administrator.<sup>78</sup> The estoppel incumbent on the tenant not only applies where he takes premises under a lease of an individual or a corporation but also where he takes public lands under a lease. Thus, the tenant is estopped to deny the title of the state to land under water for which he heretofore paid rent.<sup>79</sup> In construing the estoppel in favor of the landlord, the courts have been liberal in the understanding which they have attached to the word "landlord." Thus, as we have seen, the estoppel may be taken advantage of by the personal representative of the deceased land-

<sup>73</sup> *Lennon v. Palmer*, 5 L. R. 5 Ir. 100; *Parker v. McLaughlin*, 1 L. R. N. S. 186; *Whitton v. Peacock*, 2 Bing. (N. C.) 411; *Sturgeon v. Wingfield*, 15 M. & Wel. 224; *Cuthbertson v. Irving*, 6 H. & W. 135, 29 L. J. Ex. 485, 6 Jur. (N. S.) 191, 3 L. T. 335, 8 W. R. 704; *Henley v. Branch Bank of Mobile*, 16 Ala. 552; *Funk's Lessee v. Kincaid*, 5 Md. 404; *Benedict v. Morse*, 10 Met. (Mass.) 223; *Ingraham v. Baldwin*, 9 N. Y. 45; affirming 12 Barb. (N. Y.) 9; *Clarke v. Crego*, 51 N. Y. 646, affirming 47 Barb. (N. Y.) 599; *Barton v. Learnard*, 26 Vt. 192.

<sup>74</sup> *Bishop v. Lalouette's Heirs*, 67 Ala. 197; *Brenner v. Bigelow*, 8 Kan. 496; *Blantin v. Whitaker*, 11 Humph. (Tenn.) 310.

<sup>75</sup> *Steen v. Wardsworth*, 17 Vt. 297.

<sup>76</sup> *State ex rel Carter v. Votaw*, 13 Mont. 403, 34 Pac. Rep. 315. See also *James v. Smith* (Ind. Ter.), 58 S. W. Rep. 714; *Ronaldson v. Tabor*, 43 Ga. 230.

<sup>77</sup> *Taylor v. White*, 86 Mo. App. 526.

<sup>78</sup> *Hamer v. McCall*, 28 S. E. Rep. 297, 121 N. Car. 196.

<sup>79</sup> *Hurst v. Dunlany*, 5 S. E. Rep. 802, 84 Va. 701.

lord or by the agent of the living landlord though neither has any legal interest in the reversion. So, the occupant of a town lot, the fee of which is still in the federal government, is estopped to assert that his landlord, a patentee, has no title. For in any of these cases the fact of the real ownership of the reversion is not so important as an element of the estoppel as the fact that the tenant by going into possession and paying rent has admitted the landlord's title.<sup>80</sup> The estoppel applies to one who has a lease of land under water which he has taken from the owner of the land which lies on the margin of the stream.<sup>81</sup> But a lessee who has paid his rent to a person to whom his landlord gave a warranty deed of the premises as security and to whom he was directed by his landlord to pay the rent which was applied to pay off a debt of the landlord, is not estopped to deny such person's title to the reversion in an action brought by the lessee to secure a renewal of the lease.<sup>82</sup> Where a tenant while in the possession of land under a lease, takes a second lease from another person who is claiming adversely to his lessor, and in consequence of the second lease, the second lessor allows him to remain in undisturbed possession, the tenant is thereafter estopped to deny the title of the new or second lessor until he shall have surrendered the possession to him.<sup>83</sup> The estoppel will preclude a tenant from denying the landlord's title derived under a will where the lease was executed under a power contained in the will.<sup>84</sup> And the estoppel may also be invoked by trustees as well as by other persons.<sup>85</sup> But it has been held that where a lease was granted under a power contained in the settlement which recites the title of the lessor by which it

<sup>80</sup> Shy v. Brackhouse, 7 Okl. 35, 54 Pac. Rep. 306.

<sup>81</sup> Tullis v. Tacoma Land Co., 19 Wash. St. 140, 52 Pac. Rep. 1017.

<sup>82</sup> Tilleny v. Knoblauch, 73 Minn. 108, 75 N. W. Rep. 1039.

<sup>83</sup> Buchanan v. Larkin, 116 Ala. 431, 22 So. Rep. 543; Forgy v. Harvey, 151 Ind. 507, 51 N. E. Rep. 1066; Carter v. Marshall, 72 Ill. 609; Bowdish v. Dubuque, 38 Iowa, 341; Kelley v. Kelley, 23 Me. 192; Hawes v. Shaw, 100

Mass. 187; Campau v. Lafferty, 43 Mich. 429, 5 N. W. Rep. 648; Parrott v. Hungelburger, 9 Mont. 526, 24 Pac. Rep. 14; Hamilton v. Pittock, 158 Pa. St. 457, 27 Atl. Rep. 1079; Lucas v. Brooks, 18 Wall (U. S.) 436, 21 L. Ed. 779; Piper v. Cashell, 122 Fed. Rep. 614, 616, 58 C. C. A. 396.

<sup>84</sup> Bringloe v. Goodson, 5 Bing. N. C. 738.

<sup>85</sup> Willington v. Brown, 8 Q. B. 169.

appears that he only had an equitable interest, the lessee may dispute his title and show that he did not have the legal interest.<sup>86</sup>

**§ 564. Upon whom the estoppel is binding.** The estoppel which is binding on the tenant applies with equal force to every person who by reason of privity with him, enters upon possession of the demised land during the term of the lease.<sup>87</sup> For where the relationship of landlord and tenant is once established, the estoppel attaches to all persons who succeed to the possession of the premises, through or under the tenant. They are all bound by the implied obligation of the original tenant to acquiesce in the title of his landlord to the same extent as though it were their own. Where the relationship of landlord and tenant is once established, it attaches to all who may succeed to the possession under the tenant. Thus, where a tenant has conveyed the leased premises by a deed, purporting to convey a fee simple title to one having notice of the lease, the deed, though absolute on its face, operates merely as an assignment of the lease, and the grantee going into possession thereunder, enters simply as a tenant of the lessor and he must pay him rent. So, though the term had expired when the grantee took the conveyance, and went into possession, yet as he had notice that his grantor was a tenant and as there never was any surrender of possession by the tenant, the grantor will be regarded as holding over with the consent of the landlord and will be a tenant from year to year or at will, liable for the rent agreed upon under the lease.<sup>88</sup> For the estoppel which is binding upon the lessee is equally binding upon all persons who by agreement with him or by collusion with him succeed either to his interest in or to his possession of the leased premises. The estoppel is binding upon the grantee of the lessee,<sup>89</sup> upon a grantee by

<sup>86</sup> *Greenway v. Hart*, 14 C. B. 348.

Miss. 383, 387; *Harper v. Gustin*, 12 N. J. Law, 42, 51; *Jones v. Dove*, 7 Oreg. 467, 472; *McLennan v. Grant*, 8 Wash. 603, 36 Pac. Rep. 682; *Lockwood v. Walker*, 3 McLean (N. O.) 431.

<sup>87</sup> *Russell v. Irwin's Adm'r*, 38 Ala. 44; *Rose v. Davis*, 11 Cal. 133; *Doty v. Burdick*, 83 Ill. 473; *Beck v. Minnesota & Western Grain Co.* (Iowa, 1906), 107 N. W. Rep. 1032; *Chambers v. Pleak*, 6 Dana. (Ky.) 426, 32 Am. Dec. 78; *Farley v. Rogers*, 1 A. K. Marsh. (Ky.) 245; *Newman v. Mackin*, 21

<sup>88</sup> *De Pere Co. v. Reynan*, 65 Wis. 271, 275, 22 N. W. Rep. 761, 27 N. W. Rep. 155.

<sup>89</sup> *Owen v. Village of Brookport*, 208 Ill. 35, 60 N. E. Rep. 952.

quit claim of the assignee of the tenant;<sup>90</sup> upon one who purchases the leasehold interest of the tenant at a judicial sale,<sup>91</sup> upon one who enters the demised land in accordance with an agreement with the tenant who leaves the land vacant,<sup>92</sup> and on the surety of a tenant who is not disturbed in his possession by the landlord or by a paramount title during the term.<sup>93</sup> So, where a lessee who has the privilege of a renewal, sublet contrary to a covenant forbidding him to do so, the sublease to begin at the end of the term and the tenant fails to renew, the sublessee so long as he remains in possession, is bound by his lessor's estoppel.<sup>94</sup> The estoppel is also binding upon a sublessee who has attorned to the assignee of his lessor and had thereafter continued to hold under the assignee and to pay him rent. He cannot thereafter deny the assignee's title.<sup>95</sup> Lessees who attorn to the executor of their deceased landlord and pay him rent are thereafter estopped to allege or to show that the executor had no authority to collect rent or to have charge of the real estate.<sup>96</sup> So, also, the estoppel is binding upon a vendor of land who after the conveyance of the land to his vendee, leases it from the vendee though his conveyance to his vendee was void,<sup>97</sup> and the vendee took no title and upon the owner of land which has been sold under a judgment or a decree of a court of competent jurisdiction so long as the owner remains in possession after the sale.<sup>98</sup> So, a pastor of a church cannot dispute the title of his church to the parsonage which he occupies as a *quasi* tenant under the contract of hiring between the parties.<sup>99</sup> And though a lease for a term of years by an executrix and trustee under a will may be void because not confirmed by the court as pro-

<sup>90</sup> McLennan v. Grant, 8 Wash. 603, 36 Pac. Rep. 682.

<sup>95</sup> Dunshee v. Grundy, 15 Gray (Mass.) 314.

<sup>91</sup> Manspeaker v. Pipher, 5 Kan. App. 897, 48 Pac. Rep. 868, affirmed in Hentig v. Pipher, 58 Kan. 788, 51 Pac. Rep. 229.

<sup>96</sup> Howe v. Gregory, 2 Ind. App. 477, 28 N. E. Rep. 776.

<sup>92</sup> Steward v. Keener, 131 N. Car. 486, 42 S. E. Rep. 934.

<sup>97</sup> Vancleave v. Wilson, 73 Ala. 387.  
<sup>98</sup> Siglar v. Malone, 3 Humph. (Tenn.) 16; Wood v. Turner, 7 Humph. (Tenn.) 517.

<sup>93</sup> Oliver v. Gary, 42 Kan. 623, 22 Pac. Rep. 733; Ewing v. Cottman, 9 Pa. Super. Ct. 44, W. N. C. 525.

<sup>99</sup> West Koshkonong Cong. v. Ottesen, 80 Wis. 62, 49 N. W. Rep. 24.'

<sup>94</sup> Fordyce v. Young, 39 Ark. 135.

vided by statute, the lessee cannot urge this, where he has entered into possession and is sued for rent. This estoppel binds the executors of the lessee who also entered into possession under the lease.<sup>1</sup> The estate of a tenant for life and that of the remainderman are derived from the same title. Hence, a lessee of the tenant for life cannot set up title in another person as against the remainderman after the death of the tenant for life.<sup>2</sup> So, the assignee of a void lease by a tenant for life is estopped to deny the title of the remainderman though his assignment was made after the death of the tenant for life, where the remainderman has accepted him as a tenant.<sup>3</sup> The wife of a tenant in possession after the death of the tenant and his heirs while in possession<sup>4</sup> are estopped to deny the title of the landlord. So, one to whom the tenant has conveyed the fee of the demised premises is estopped to assert the title which he has thus obtained from the tenant through the tenant's conveyance as against the lessor,<sup>5</sup> unless the title of the landlord is barred by the statute of limitations.<sup>5a</sup> A debtor who conveys real property to his creditor, the debtor remaining in possession under a written lease from the latter, with an agreement in writing between the parties that the property shall be reconveyed to the debtor when he shall have paid all the rent and the money due cannot deny his landlord's title or set up the agreement to reconvey when the latter sues him for the rent.<sup>6</sup> A tenant for life who takes a lease for a term of years from the remainderman is estopped during the term as against the remainderman to assert his right under the life estate. Thus, where a widow after the death of her husband accepts a lease for a term of years from the heirs of her husband in land of which she is endowable, her right to dower in the land which she has leased is suspended during the continuance of her term. Her right to dower is adverse to the title of the heir, and she cannot, while she is a tenant of the heir, assert any right, title or interest which is adverse to the heir's title. Before she has gone into possession under the

<sup>1</sup> Steuber v. Huber, 107 App. Div. 599, 95 N. Y. Supp. 348.

<sup>2</sup> Colemore v. Whitroe, 1 D. & Ry. 1.

<sup>3</sup> Johnson v. Mason, 1 Esp. 89.

<sup>4</sup> Lewis v. Adams, 61 Ga. 559.

<sup>5</sup> Phillips v. Rathwell, 4 Bibb. (Ky.) 33.

<sup>5a</sup> Lane's Lessee v. Osment, 9 Yerg. (Tenn.) 86.

<sup>6</sup> Knowles v. Murphy, 107 Cal. 107, 40 Pac. Rep. 111.

lease or after she has surrendered possession under the lease she may have her dower admeasured but while she is under the lease she cannot maintain any action to measure her dower in any land she occupies as a tenant. The widow is competent to bind herself by any contract and by entering into a lease with the heir she recognizes his existing title and his present right of possession during the period of the lease. Having done this she cannot thereafter dispute his rights in that respect nor assert a title in herself which is paramount to the title in the heir.<sup>7</sup> But on the other hand the estoppel is not binding upon one to whom is granted an easement,<sup>8</sup> nor upon one who, though neither a party to the lease nor in privity with a lessee pays the consideration of the lease, that is to say, the rent, to the lessor.<sup>9</sup> Nor upon a mortgagor, who having a right to redeem the equity after foreclosure, takes a lease from the assignee of the mortgagee who is in possession of the premises.<sup>10</sup> Nor upon a tenant of the whole premises who, supposing that another person was a tenant in common with him of the whole premises accounted to such person for a moiety of the rent of the premises.<sup>11</sup> Nor upon an owner of land who after he has conveyed the land, agrees to pay rent for it without prejudice to his right while an action brought by him to have the conveyance set aside is pending.<sup>12</sup> The estoppel is also binding upon a person who persuades the lessee to vacate the premises during the term and who then enters into possession without acquiring any title.<sup>13</sup> There may be some cases where a landlord is in a way estopped to deny his tenant's title under the lease. Thus, one who by express contract or conduct has lead another to assume that the relation of landlord and tenant exists between them as where an owner of land receives rent as a tenant from one in possession will

<sup>7</sup> Perkins, § 350; Viner's Abr. (2d ed.) tit. "Dower;" Bacon's

Abr. tit. "Dower," p. 382; Park on Dower, p. 214; Scrib. Dower, c. 11, 16-18; Heisen v. Heisen, 145 Ill.

648, 34 N. E. Rep. 597.

<sup>8</sup> Swift v. Goodrich, 70 Cal. 103,

<sup>11</sup> Pac. Rep. 561 (case between riparian owners of right to use water).

<sup>9</sup> Merwin v. Camp, 3 Conn. 35.

<sup>10</sup> Atkinson v. Morrison, 3 Oreg. 332.

<sup>11</sup> Shearer v. Winston, 33 Miss. 149, 152; Sulphine v. Dunbar, 55 Miss. 255, 261.

<sup>12</sup> Sartwell v. Young, 126 Mich. 304, 8 Detroit Leg. N. 30, 85 N. W. Rep. 729.

<sup>13</sup> Swan v. Busby, 5 Tex. Civ. App. 63, 24 S. W. Rep. 303.

be estopped to assert the occupant was not his tenant while the occupation continued.<sup>14</sup> A disclaimer of his ownership by the landlord alleging the ownership of the land is in another, will not estop him from subsequently collecting rent or compensation for the use and occupation of the premises unless it has been acted on by the tenant in such a way as would work him an injury to permit the landlord to assert the tenancy. The landlord who being in doubt as to his ownership, declines to receive the rent until a litigation in which his ownership is in issue shall be determined may thereafter recover the rent from his tenant unless the latter in the meantime, relying upon his landlord's statement that he had no title and his refusal to accept the rent, has paid the rent to another.<sup>15</sup>

§ 565. **The rights of a person obtaining the possession by collusion.** A person who, by collusion with the tenant obtains possession of the leased premises by an entry thereon, the tenant himself being in possession, is bound equally with the tenant by the estoppel which is binding on the tenant so long as he remains in possession. It is immaterial in what character the third person enters upon the premises. As against the landlord, he is estopped to assert title whether he be an assignee of the tenant or a subtenant. If he claim under the tenant in any capacity, the estoppel is binding upon him. For the tenant cannot confer upon the newcomer a greater estate than he has, nor can the latter hold while he is in possession except as a tenant. His holding while in possession under title from the tenant is not adverse to the landlord and he cannot therefore claim a title paramount to that of the landlord until he has surrendered the possession.<sup>16</sup> And it makes no difference usually so far as the estoppel is concerned whether the parties who entered and occupied in the place of the tenant, do so by consent of the latter as would be the case of an assignee or a subtenant, or by a col-

<sup>14</sup> Schwarze v. Mahoney, 97 Cal. 131, 31 Pac. Rep. 908; Hockenbury v. Snyder, 2 Watts & S. (Pa.) 240; Goldsbrough v. Gable, 36 Ill. App. 363, reversing 140 Ill. 269, 29 N. E. Rep. 722, 15 L. R. A. 294.

<sup>15</sup> Chambers v. Ross, 25 N. J. Law, 293, 296.

<sup>16</sup> Standley v. Stevens, 66 Cal.

541, 6 Pac. Rep. 420; Fleming v. Mills, 182 Ill. 464, 55 N. E. Rep. 373; Ragar v. McKay, 44 Ill. App. 79, 81; Bertram v. Cook, 32 Mich. 518, 521; Fusselman v. Worthington, 14 Ill. 135, 136; Swan v. Busby, 5 Tex. Civ. App. 63, 66, 24 S. W. Rep. 303.

lusive recovery of the possession in an action to which the tenant but not the landlord is a party.<sup>17</sup> The rules above stated are particularly applicable to the case where the tenant has assigned his term and the assignee has entered into possession under the assignment. The estoppel which is binding on the tenant and for which he is forbidden to deny the title of his landlord is equally binding upon his assignee or upon his subtenant. The assignee or subtenant while he is in possession cannot deny the title of the original landlord.<sup>17a</sup> Hence, a person who comes into possession of the premises by an assignment of the lease from the lessee and who continues thereafter to hold possession under the assignment, paying rent to the lessor, is thereafter estopped from claiming that the lessor had no title.<sup>17b</sup> A person who, not being an assignee, induces the tenant to abandon the premises and then takes possession of them, though acquiring no title which is superior to the landlord is, during his possession, estopped to deny the title of the landlord.<sup>17c</sup> As an illustration, it may be said that a municipal corporation cannot set up any right inconsistent with the lessor's title where it enters and occupies premises under a lease which it takes by assignment.<sup>18</sup>

**§ 566. The estoppel as to sub-tenants.** A sub-tenant is estopped to deny the title of his immediate lessor to the same extent that his lessor is estopped to deny the title of the original landlord.<sup>19</sup> The rule that applies to the relation of the original lessor and lessee as regards the estoppel existing between them is equally applicable to the relation existing between the original lessee and one to whom he has granted the sublease. Thus, the

<sup>17</sup> Stewart v. Roderick, 4 Watts & S. (Pa.) 188, 39 Am. Dec. 71.

<sup>18</sup> Ballance v. Peoria, 180 Ill. App. 29, 24 N. E. Rep. 428.

<sup>17a</sup> Lunsford v. Alexander, 20 N. C. 166; Millhouse v. Patrick, 6 Rich. Law. (S. C.) 350; Morris v. Wheat, 11 App. D. C. 201.

<sup>19</sup> Burnett v. Rich, 45 Ga. 211;

<sup>17b</sup> Green v. Wilson, 8 Ky. Law. Rep. 825, 2 S. W. Rep. 564; Earle's Adm'r v. Hales' Adm'r, 31 Ark. 470; Derrick v. Luddy, 64 Vt. 462, 24 Atl. Rep. 1050.

Sexton v. Carley, 147 Ill. 269, 35 N. E. Rep. 471, affirming 47 Ill.

<sup>17c</sup> Swan v. Busby, 5 Tex. Civ. App. 65, 24 S. W. Rep. 303.

App. 316; Coburn v. Palmer, 8 Cush. (Mass.) 124; Bonds v.

Smith, 106 N. C. 553, 11 S. E. Rep. 322; Milhouse v. Patrick, 6 Rich. Law. (S. C.) 350; Scott v.

Levy, 6 Lea (Tenn.) 662.

estoppel is binding upon a person who has obtained possession through collusion with a sublessee, and the lessee need not prove in an action against the occupant that he has complied with the terms of the lease under which he holds for he has the benefit of the estoppel.<sup>20</sup> If after the surrender of the lease by the original lessee the subtenant becomes a tenant of the original lessor he is thereafter estopped to deny the title of the original lessor. For, though while the original lessee was in possession no privity of contract exists between the subtenant and the primary landlord, yet, when after the lease has been surrendered the primary landlord accepts the subtenants as his tenants, the situation is materially changed and the relationship between the former subtenant and the former landlord is that of landlord and tenant.

**§ 567. The vendee in possession as a tenant is estopped.** The rule is sometimes broadly stated that a vendee in possession of the land which he has purchased before the execution of a conveyance by the vendor is a tenant at will of the vendor. Where this rule is recognized and a tenancy by implication is assumed to have been created by virtue of it, the vendee, so long as he continues in possession under the contract, and without a conveyance is estopped to deny the vendor's title.<sup>21</sup> So, where a vendee in possession assigns his contract to another person who subsequently obtains a deed and conveys, the vendee as a part of this arrangement agreeing to buy the land of the last purchaser which he fails to do, he cannot deny the latter's title and is liable to him for rent.<sup>22</sup> A vendee in possession under a contract to purchase, in the absence of an express agreement, is at least a *quasi tenant*, holding under his vendor's title which while in possession he is estopped to deny. He cannot while thus in possession attorn to a stranger without the consent of the ven-

<sup>20</sup> *Sexton v. Carley*, 47 Ill. App. 316, affirmed in 147 Ill. 269, 35 N. E. Rep. 471.

Ired. (N. C.) 152; *Jordan v. Katz*, 89 Va. 628, 631, 16 S. E. Rep. 866; *Locke v. Frasher*, 79 Va. 409; *Emerick v. Tavener*, 9 Gratt. (Va.) 220.

<sup>21</sup> *Williams v. Cash*, 27 Ga. 507; *Dubois v. Marshall*, 3 Dana (Ky.) 336; *Wolf v. Holton*, 92 Mich. 136, 138, 104 Mich. 107, 108; *Hubbard v. Shepard*, 117 Mich. 25, 75 N. W. Rep. 92; *Love v. Edmonston*, 1

<sup>22</sup> *Henderson v. Miller*, 53 Mich. 590, 19 N. W. Rep. 197.

dor, and if he shall attempt to do so, the stranger acquires no interest and cannot thereafter sustain a claim of an adverse possession based on the attorney.<sup>23</sup> For if a vendee takes possession under his contract and subsequently enters into a lease with the vendor or assumes any other character than that under which he entered, he loses his equitable rights under his agreement to purchase and his possession is referred to his new agreement. He no longer can enforce his contract to buy nor can he dispute his landlord's title which he may do as long as he continues to be merely a vendee. And his possession is no longer notice to a purchaser of his equity to purchase but only of the lease<sup>24</sup> and its terms as a lease.

**§ 568. The tenant holding over.** By reason of the rule that the estoppel of a tenant to deny the title of his landlord continues during the whole of the period that he remains in possession, it follows that the fact that his term has expired does not remove the estoppel unless he surrenders possession.<sup>25</sup> Hence, a tenant who continues in possession after the expiration of his term is not by that fact permitted to deny the title of his landlord.<sup>26</sup> So, where the tenant holding over after his lease has expired is sued for the reasonable value of the use and occupation of the premises for the period he has held over, he will not be allowed to attack the validity of his landlord's title during the time of his holding over.<sup>27</sup> The same rule is applicable in an action of unlawful or forcible detainer brought by the landlord against a tenant holding over.<sup>28</sup> The holding over is characterized and attended by all the terms and conditions in law or fact of the prior lease in so far as they may be applicable,

<sup>23</sup> Dubois v. Marshall, 3 Dana (Ky.) 336; Kirk v. Taylor's Heirs, 8 B. Mon. (Ky.) 262, 264.

<sup>24</sup> Rankin v. Simpson, 19 Pa. St. 471, 476.

<sup>25</sup> Sittel v. Wright, 122 Fed. Rep. 434. *Contra*, Dodge v. Phelan, 2 Tex. Civ. App. 441, 21 S. W. Rep. 309.

<sup>26</sup> Grizzard v. Roberts, 110 Ga. 41, 35 S. E. Rep. 41; Burgess v. Rice, 74 Cal. 590, 16 Pac. Rep. 496; McKissick v. Ashby, 98 Cal. 422, 33 Pac. Rep. 729; Houck v.

Williams, 34 Colo. 138, 81 Pac. Rep. 800; Jackson v. Stiles, 1 Cow. 575; Harrison v. Marshall, 4 Bibb. (Ky.) 524, 525; Falkner v. Beers, 2 Doug. (Mich.) 117, 129.

<sup>27</sup> Osgood v. Dewey, 13 Johns. (N. Y.) 240; Moore v. Beasley, 3 Ohio, 294, 296; Dorrill v. Stephens, 4 McCord. (S. C.) 59; Frontz v. Wood, 2 Hill Law. (S. C.) 367.

<sup>28</sup> King v. Bolling, 77 Ala. 594; Anderson v. Anderson, 104 Ala. 428, 16 So. Rep. 14; Harrison v. Marshall, 4 Bibb. (Ky.) 524, 525.

one of which is the principle or rule of estoppel which was binding on the parties.<sup>29</sup>

§ 569. **The tenant not estopped as to land of his landlord not included in the lease.** A tenant is not estopped to dispute the title of his landlord as to any lands which are not included in the lease under which he occupies. He may occupy other land of the landlord adversely to the landlord where such other land is not held by him as a tenant. So, though one who is a tenant of only a part of a tract of land is estopped to deny his landlord's title as regards the part which he holds under the lease, he may deny the landlord's title as to the part which is not leased to him.<sup>30</sup> But a tenant who occupies a tract of land under a lease from the owner is estopped to deny his landlord's title to each and every part of the same.<sup>31</sup> The tenant cannot occupy all the land and admit the landlord has a good title to a part of it and claim to hold the balance of it in his own right adverse to the landlord. This is true although the written lease expressly states that the landlord had no title to a portion of the land which he has demised, and also states that the landlord leased only such interest in the land as he might have at the time.<sup>32</sup> But a tenant of an undivided interest in land while he is holding over after the expiration of the lease and after the landlord has refused to renew his lease under a covenant in the lease giving him a renewal, is not estopped to prove against his landlord that during the term of the first lease, he had himself become the owner of the other undivided portion and that as a

<sup>29</sup> Osgood v. Dewey, 13 Johns. (N. Y.) 240.

<sup>30</sup> State v. Boyce, 109 N. C. 739, 746, 14 S. E. Rep. 98, 101; Pedderick v. Searle, 5 S. & R. (Pa.) 236; Wyoming Coal Co. v. Price, 81 Pa. St. 156, 176; Swan v. Castleman, 4 Baxt. (Tenn.) 257, 265; Scott v. Elkins, 83 N. C. 424; Lamb v. Swain, 3 Jones (N. C.) 370.

<sup>31</sup> Miller v. Turney, 13 Ark. 385; Byrnes v. Douglass, 23 Neb. 83, 87, 42 Pac. Rep. 798.

<sup>32</sup> Tilyou v. Reynolds, 108 N. Y. 558, 563, 15 N. E. Rep. 534, in

which the court said: "The title he acknowledges and accepts he must abide by while the relation lasts. The result is the same though on the face of the lease it should appear that the landlord has no legal estate. If the parties agree that the relation of landlord and tenant shall be created, and the agreement is carried out by one being let into possession, then, as between them the relation of landlord and tenant is created and they are just as much estopped as if there had been no such statement."

consequence of this he is then a tenant in common of the whole land with his landlord.<sup>33</sup>

**§ 570. Leases created by estoppel.** A person who, having no legal title to land, leases it for a term of years before he acquires the title to the land will be regarded as lessor by estoppel. After he shall have acquired title to the land the relation between him and his tenant is that of landlord and tenant and he will be estopped to show that he did not have title to the land when he made the lease.<sup>34</sup> A lease entered into by one who has no title to land is not binding on the owner of the land because he has not executed the same. It is binding on the one who did execute it as a lease by estoppel and after he purchases or otherwise acquires title as a lease in interest.<sup>35</sup> So, where an heir leases land to another during the life of his ancestor, on the death of the ancestor before the term expires, the lease becomes at once a lease in interest of which the heir is the landlord.<sup>36</sup> The same rule applies to one who makes a lease of land during the life of the testator who devised it to him.<sup>37</sup> In order to operate as a lease by estoppel, the lands which are included in the lease must be particularly described and if a lease be made of all the lands which a lessor had in a particular township, and at that time he owned no lands in that place, the lease will not create an estoppel against the lessor if he subsequently acquired in land there as the description is too vague and general. It was at one time held that a lease could not operate as a lease by estoppel if it appeared on the face of it that the lessor had no title but that if he falsely stated therein that he had no title when as a matter of fact he did have title the recital would be void and the lease would operate. Under the rule that both parties must be bound, it has been held that a lease cannot ope-

<sup>33</sup> Willis v. McKinnon, 165 N. Y. 612, 59 N. E. Rep. 1132, reversing 54 N. Y. Supp. 1079, 35 App. Div. 131.

<sup>34</sup> Webb v. Austin, 7 M. & G. 701, 4 Bacon's Abr. tit. "Leases," 189; Co. Litt. 47, 227a; Doe d. Prior v. Ongley, 10 Com. Bench, 25; Smith v. Low, 1 Atk. 489; Sturgeon v. Wingfield, 15 M. & W. 224; Doe v. Fuller, Tyr. & G. 17.

<sup>35</sup> Bacon's Abr. tit. "Leases," 189.

<sup>36</sup> Hooks v. Bellamy, 1 Keb. 530; Rothwell's Case, Hut. 91; Anon. Dal. 27, pl. 4; Smith v. Law, 1 Atk. 489; Rawlin's Case, 4 Coke, 53a; Iseham v. Morrice, Cro. Car. 109; Hermitage v. Tompkins, 1 Ld. Rayd. 729; Goodtitle v. Morse, 3 T. R. 371.

<sup>37</sup> Hooks v. Bellamy, 1 Keb. 530.

rate as a lease by way of estoppel unless both parties signed it.<sup>38</sup> So, a lease by deed poll will not operate as a lease by estoppel because the lessee is not bound by it. A lease executed in original or duplicate and counterpart by both parties is regarded as one instrument and may operate as a lease by estoppel.<sup>39</sup> If any interest passes under the lease as such it will not operate as a lease by estoppel.<sup>40</sup> And finally, inasmuch as an estoppel is not confined to the parties of the lease but is annexed to the estate, it is binding upon all the parties claiming thereunder.<sup>41</sup>

**§ 571. The general rule as to the purchase of outstanding encumbrances by the tenant.** As a consequence of the rule that a tenant is estopped to deny the landlord's title while he continues in possession, it follows that a tenant who buys an outstanding title of the premises while he is in possession cannot successfully assert that title as against his landlord. The title may be an outstanding title superior to that of his landlord and under it he may claim as against all the world except the landlord. But the conveyance to him has no force to convey a title upon him as against his landlord while he continues in possession.<sup>42</sup> Thus, a tenant who buys an outstanding mortgage which is about to be foreclosed for the purpose of protecting his possession acquires no right thereby to enforce the mortgage and he will be entitled on the foreclosure of the same only to the amount of the principal with legal interest less the rent accruing down to the time of the sale.<sup>43</sup> For, if while in possession

<sup>38</sup> Co. Litt. 47a, 363b; Pike v. Eyre, 9 B. & C. 909; Hooks v. Bellamy, 1 Keb. 536; Hillman v. Hore, Carth. 247; Cardwell v. Lucas, 2 M. & W. 111; Palmer v. Elkins, 2 Ld. Rayd. 1550; Wilson v. Woolfryes, 6 M. & S. 341; Wood v. Day, 7 Taunt, 646; Atkinson v. Coatsworth, 8 Mod. 30.

<sup>39</sup> Blake v. Foster, 8 T. R. 496.

<sup>40</sup> Cuthbertson v. Irving, 4 H. & N. 742, appd. 6 id. 135; Treport's Case, 6 Coke, 14a; Hill v. Saunders, 4 B. & C. 529, 2 Bing. 112, 2 C. & P. 80.

<sup>41</sup> Cuthbertson v. Irving, 4 H. & N. 742, 757; Webb v. Austin, 7 M.

& G. 701; Trevivian v. Lawrence, 6 Mod. 256; Faulkner v. Morse, 3 T. R. 371; Raylyn's Case, 4 Coke, 53a.

<sup>42</sup> Clemm v. Wilcox, 15 Ark. 102; Hughes v. Wait, 28 Ark. 153; Burgess v. Rice, 74 Cal. 590, 16 Pac. Rep. 496; Norton v. Sanders, 1 Dana (Ky.) 14; Bertram v. Cook, 32 Mich. 518; Thrall v. Omaha Hotel Co., 5 Neb. 295, 25 Am. Rep. 488; Wilson v. Smith, 5 Gerg. (Tenn.) 379; Tondro v. Cushman, 5 Wis. 279; Peyton v. Stith, 5 Pet. (U. S. 485, 8 Law ed. 200.

<sup>43</sup> Matts v. Robinson, 1 Neb. 3.

under his lease, a tenant purchases an outstanding encumbrance it will be presumed that he did so only for the purpose of protecting his own possession and where his tenancy is for a term of years the landlord must then account to him for what he paid for the encumbrance with interest.<sup>44</sup> So, a tenant of a person who has held under a tax deed can buy in or acquire the interest of the original owner having a right to redeem and assert such interest against his own landlord.<sup>45</sup> A tenant may always purchase the demised land at a sale under an execution issued against his landlord by a third person. The reason of this is that under the execution the title of the landlord is defeated and the exception is not a real exception but comes under the rule that a tenant is never precluded from showing that his landlord's title has terminated during the term.<sup>46</sup> But, a tenant who is also a judgment creditor of the landlord cannot, without notice to the landlord that he disclaims his title, issue an execution for a sale thereunder and buy in the title of his landlord for his own benefit.<sup>47</sup> So, a tenant may upon the same principle purchase the demised premises on their sale under the foreclosure of a mortgage given by the landlord or his predecessor in interest.

**§ 572. The purchase by a tenant of a tax title to the premises.** It is a general principle of law that a purchase of land at a tax sale by a person whose duty it was to pay the tax constitutes a payment of the tax only and the purchaser acquires no rights as against the owner by his neglect of the duty which he owed the owner. This proposition is so fair and reasonable and the reverse would be so unjust and inequitable that it hardly seems necessary to expect authorities to support it. Where a tenant is bound by a covenant in the lease to pay the taxes upon the land which he has rented, he cannot permit the land to be sold for the non-payment of taxes and himself purchase the same, either directly or indirectly at the tax sale. He acquires no title to the land as against the landlord by his purchase at a tax sale of the land under such circumstances. It was the duty

<sup>44</sup> Thrall v. Omaha Hotel Co., 5 Neb. 295, 25 Am. Rep. 488.

<sup>45</sup> Stout v. Merrill, 35 Iowa, 47.

<sup>46</sup> Reed v. Munn, 148 Fed. Rep. 737; Tewksbury v. Magraff, 33 Cal. 237; Tilghman v. Little, 13 Ill. 239; Higgins v. Turner, 61 Mo.

249; Nodine v. Richmond (Oreg. 1906), 87 Pac. Rep. 775; Elliott v. Smith, 23 Pa. St. 131; Camley v. Stanfield, 10 Tex. 546, 60 Am. Dec. 219.

<sup>47</sup> Matthew's Appeal, 104 Pa. St. 444.

of the tenant to prevent the sale of the land by promptly paying the taxes as they fell due and he should not be permitted to acquire a benefit by his own wrong at the expense of his lessor. The legal title which he may acquire by purchase at a sale for the non-payment of taxes will be held by him merely as a trustee for the lessor who is the true owner and whose rights will be fully protected in equity.<sup>48</sup> Nor can a lessee who was bound to pay the taxes and assessments during his term permit the land to be sold for the non-payment of taxes which became due during the term, become an assignee of the certificate of sale after the term has expired and take a deed of the premises in pursuance of the sale which shall be valid as against the lessor. The latter may compel a re-conveyance of the legal title and the mere fact that the lessee received his tax deed after the term had expired does not prevent him from being estopped to deny his lessor's title.<sup>49</sup> Where a tenant who is indebted to a landlord for

<sup>48</sup> Jackson v. King, 82 Ala. 432; Bailey v. Campbell, 82 Ala. 342, 2 So. Rep. 646; Busch v. Huston, 75 Ill. 343; Burgett v. Taliaferro, 118 Ill. 505, 9 N. E. Rep. 334; Carithers v. Weaver, 7 Kan. 110; Haskell v. Putnam, 42 Me. 244, 246; Bertram v. Cook, 32 Mich. 518, 522; Williams v. Towl, 65 Mich. 204, 31 N. W. Rep. 835; Williamson v. Russell, 18 W. Va. 612, 624, 625; Shepardson v. Elmore, 19 Wis. 424, 429. See Morris v. Aperson (Ky.) 13 S. W. Rep. 441. "It was the duty of the tenant to pay the taxes upon the demised premises. The omission to do so was a violation of good faith and a breach of the condition upon which he occupied them. To permit him to set up a title which he has obtained by a violation of his own duty, if it were in other respects good, would be manifestly inequitable and in fraud of the rights of the defendant. Such a defense cannot prevail either in law or in equity and it requires

no small degree of assurance to set it up in a court of justice." By the court in Haskell v. Putnam, 42 Me. 244, on p. 246.

<sup>49</sup> Shepardson v. Elmore, 19 Wis. 424, 429. Apart from the duty of a tenant to set up no adverse claim while he holds under the possession obtained under his landlord's title, all of the taxes were levied on property which he had added to the realty himself. The rent which he paid is mentioned repeatedly in the receipts as a ground rent, and the annual taxes for which these sales were made exceeded the entire rent by about its full face; so that if the landlord had been bound to keep down the taxes upon the improvements, instead of receiving revenue he would have had to pay a large sum annually for the benefit of the tenant. This would be an absurd rule. Under our tax laws a tenant has always been allowed to pay taxes, and set them off against his rent, so that he is

the rent buys in the property at a tax sale, it is a presumption that he means to pay the taxes for his landlord out of the rent in arrears whether the taxes accrued during his occupancy or not; so a person who is in possession of land but without admitting that he is a tenant who purchases the land at a tax sale is incapable of holding the same as against the true owner.<sup>50</sup> Where, however, a tenant has not expressly agreed to pay the taxes and there are no facts and circumstances in the case which impose upon him the legal or moral duty of paying the taxes and assessments, there seems to be no reason either in law or in equity why a tenant may not purchase the demised premises at a tax sale and set up an adverse possession thus acquired against his lessor without delivering up possession.<sup>51</sup> He holds, however, subject to the right of the owner to redeem the land by the payment of taxes and all penalties and interest accrued thereon. So, also, while a tenant may buy land sold for taxes which accrue during the term without his fault, that is, where the premises are sold solely by reason of the default of the landlord, and may set up the title thus acquired against the latter without delivering possession, yet in equity he may be treated as a trustee and compelled to allow redemption. He will not be allowed to abundantly protected by law in such payments. There could never be any necessity of purchasing tax titles for taxes levied during his holding and the law will not permit any such fraud on the landlord. *Williams v. Towle*, 65 Mich. 204, 206.

<sup>50</sup> *Gaskins v. Blake*, 27 Miss. 675, in which it was said: "It is immaterial in what light the question may be viewed. If the defendant is treated as a tenant then his deed clearly gave him no title. If he takes the ground that he was a trespasser, neither the policy of the law nor sound morality will permit such a defense. And finally if he takes the ground that he supposed himself to be the owner of the land, then, to be consistent with such position, he must admit that it was his duty to pay

the taxes and that the plaintiffs were not in this respect in default."

<sup>51</sup> *Bettison v. Budd*, 17 Ark. 546, 65 Am. Dec. 442; *Ferguson v. Etter*, 21 Ark. 160, 76 Am. Dec. 361; *Smith v. Newman*, 62 Kan. 318, 62 Pac. Rep. 1011; *Weichselbaum v. Curlett*, 20 Kan. 709, 710, 27 Am. Rep. 204; *Keys v. Forrest*, 90 Md. 132, 45 Atl. Rep. 22; *Higgins v. Turner*, 61 Mo. 249, 252; *Silvey v. Summer*, 61 Mo. 253, 255; *Simers v. Salters*, 3 Denio (N. Y.) 212; *Jackson v. Rowland*, 6 Wend. (N. Y.) 666; *Hilton v. Bender*, 4 Thomp. & C. (N. Y.) 270; *Crosby v. Donnowsky* (Tex. 1902), 69 S. W. Rep. 612; *Lang v. Crothers* (Tex. 1899), 51 S. W. 271; *Wright v. Jessup* (Wash. 1906), 87 Pac. Rep. 930.

speculate upon his purchase nor allowed to receive more than legal interest upon the sums paid by him for taxes.<sup>52</sup> Under the circumstances, it is necessary in order that the statute of limitations shall begin to run in his favor, that he shall notify his landlord that he repudiates his title.<sup>53</sup> These rules are applicable where a tenant acquires the fee under a tax deed. Possession under a tax deed is always subordinate to the title of the owner of the fee. So, also, the continued holding over of the tax lessee after the expiration of his lease, will be subordinate to the title of the owner unless the lessee shall disclaim the owner's title or surrender possession to him and gain another source of title. The statute of limitation creating an adverse possession in favor of one who claims title under a written instrument does not operate in favor of one who has merely a tax lease for a term or for persons who hold over after such lease has expired.<sup>54</sup>

**§ 573. The general rule as to the adverse possession of the landlord.** The adverse possession of and by the tenant enures to the benefit of the landlord and gives him the same rights against the world as though he were in actual possession. This situation continues so long as the tenant remains in possession, unless the tenant repudiates the tenancy and gives notice to the landlord that henceforth he will not recognize him as his landlord.<sup>55</sup> The rule that a tenant cannot deny the

<sup>52</sup> Waggoner v. McLaughlin, 33 Ark. 195. See, also, Dufitt v. Tuhan, 28 Kan. 292; Lacey v. Davis, 4 Mich. 140; Hall v. Westcott, 15 R. I. 373, 5 Atl. Rep. 629, which held that a mortgagee out of possession cannot become a purchaser at a tax sale and hold against the mortgagor, citing numerous cases, among which is Woodbury v. Swan, 59 N. H. 22.

<sup>53</sup> Bryson & Hartgrove v. Boyce (Tex. Civ. App. 1906), 92 S. W. Rep. 820.

<sup>54</sup> Miller v. Warren, 182 N. Y. 539, 75 N. E. Rep. 1131, affirming 87 N. Y. Supp. 1011, 94 App. Div. 192.

<sup>55</sup> Lecatt v. Stewart, 2 Stew.

(Ala.) 474; Brunson v. Morgan, 84 Ala. 578, 4 So. Rep. 589; Wheeler v. Foote (Ark. 1906), 97 S. W. Rep. 447; Elliot v. Dycke, 78 Ala. 150; Flannery v. Hightower, 97 Ga. 592, 25 S. E. Rep. 371; Cox v. Daugherty, 62 Ark. 629, 38 S. W. Rep. 184; Lawrence v. Webster, 44 Cal. 385; Rayner v. Drew, 72 Cal. 307, 13 Pac. Rep. 866; McMullen v. Erwin, 58 Ga. 427, 430; Dasher v. Ellis, 102 Ga. 830, 30 S. E. Rep. 544; Burton v. Perry, 146 Ill. 71, 34 N. E. Rep. 60; Martin v. Judd, 81 Ill. 488; Vanduyn v. Hepner, 45 Ind. 589, 594; Heights Land Co. v. Randell, 82 Iowa, 89, 47 N. W. Rep. 905; Slattery v. Slattery, 120 Iowa,

title of his landlord and the principles growing out of this rule and based upon it that he cannot set up an adverse title in himself as against his landlord apply only while the relation of landlord and tenant exists. During that time and while he is in possession he must pay rent and perform the obligations of his contract and must recognize the title upon which his possession is founded. But these rules and principles, or any other rule do not prevent the tenant from acquiring by purchase or otherwise an outstanding title, and after the expiration of the tenancy and the surrender of possession, he may assert such title against his former landlord.<sup>56</sup> A tenant remaining in possession after the expiration of his term without an open or express repudiation of the relation created by the lease, is not in contemplation of law holding adversely to the landlord whatever may be his secret intention.<sup>57</sup> The relationship of landlord and tenant once having been shown to exist is presumed to continue until it is proved to have been severed. This presumption

717, 95 N. W. Rep. 201; Martin v. Martin (Iowa, 1903), 94 N. W. Rep. 493; South's Adm'r v. Marcum (Ky. 1893), 22 S. W. Rep. 844; Blue v. Sayre, 2 Dana (Ky.) 213; Pleak v. Chambers, 5 Dana (Ky.) 60; Lee v. McDaniel, 1 A. K. Marsh. (Ky.) 234; Owings v. Gibson, 2 id. 515; West v. Price, 2 J. J. Marsh. (Ky.) 380; Tippet v. Jett, 10 La. (O. S.) 359, 362; Phelps v. Taylor, 23 La. Ann. 585, 586; Lindemayer v. Gamst, 70 Miss. 693, 13 So. Rep. 252, 35 Am. St. Rep. 685; Farrar v. Heinrich, 86 Mo. 521; Ferguson v. Bartholemew, 67 Mo. 212; Cary v. Edmonds, 71 Mo. 523; Dausch v. Crane, 109 Mo. 323, 19 S. W. Rep. 61; Wilson v. Lerche, 90 Mo. 473, 2 S. W. Rep. 799; Pharis v. Jones, 122 Mo. 125, 131, 36 S. W. Rep. 1032; Maxwell v. Higgins, 38 Neb. 671, 57 N. W. Rep. 388; Tilton v. Emery, 17 N. H. 536; Biglow v. Biglow, 56 N. Y. Supp. 794; Lambert v. Huber, 50 N. Y. Supp. 793,

22 Misc. Rep. 462; McGinnis v. Porter, 20 Pa. St. 80, 83; Schuykill, etc., Co., 58 Pa. St. 304; Williams v. McAliley, Cheves (S. C.) 200; Binda v. Benlow, 11 Rich. Law. (S. C.) 24; Reichstetter v. Reese (Tex. Civ. App.) 39 S. W. Rep. 597; Gillespie v. Jones, 26 Tex. 343; Wallace v. Wilcox, 27 Tex. 60; Chamberlain v. Pybas, 81 Tex. 511, 17 S. W. Rep. 50; Carothers v. Covington (Tex. 1894), 27 S. W. Rep. 1040; Allen v. Paul, 24 Gratt. (Va.) 332; Pulford v. Whicher, 76 Wis. 555, 45 N. W. Rep. 418; Krebs v. Dodge, 9 Wis. 1; Peyton v. Stith, 5 Pet. (U. S.) 490; Whiting v. Edmunds, 94 N. Y. 309, 314; Jackson v. Davis, 5 Cow. (N. Y.) 129; Sands v. Hughes, 53 N. Y. 293.

<sup>56</sup> Gable v. Wetherholt, 116 Ill. 313, 6 N. E. Rep. 453, 455, 56 Am. Rep. 774.

<sup>57</sup> Carson v. Broady, 56 Neb. 648, 71 Am. St. Rep. 691, 77 N. W. Rep. 80.

cannot be rebutted so as to render the holding by the tenant adverse to the landlord by proof of acts of doubtful meaning which the landlord may have had good reason to suppose were done in subordination to his title.<sup>58</sup> In order that this presumption may be rebutted and an adverse holding in the tenant initiated, the tenant must surrender his possession to the landlord, or take some equivalent action and bring it to the landlord's knowledge that he or his grantee or assignee holds adversely.<sup>59</sup> For where the relationship of landlord and tenant has been established, the possession of the tenant and that of his grantees or assignees is the possession of the landlord and cannot be hostile or adverse while the relationship continues.<sup>60</sup> The possession of a tenant who enters under the ancestor's lease may be claimed as adverse possession in favor of the heir. The same is true in the case of a devisee of the premises by the lessor. Thus, the devisee of one who dies while he was in possession of land adversely may have the advantage of the possession of the tenants of the testator, where after the death of the testator and a partition among the devisees the relation of landlord and tenant is continued between the devisees and the tenants of the testators.<sup>61</sup> The entry and occupation of premises by one of six joint lessees under a lease with the owner of the premises which is signed by all the lessees is the entry and occupation of all. The possession by one of these lessees may be taken advantage of by the owner to the same effect as the possession of all of them, whatever may be the relation existing between the lessees themselves.<sup>62</sup> The possession of the lessee enures to the benefit of the landlord and it may operate in favor of the latter to strengthen his claim by adverse possession even though the lessee dur-

<sup>58</sup> Brandon v. Brandon, 38 Pa. St. 63; Wood v. Drouthett, 44 Tex. 365.

<sup>59</sup> Whiting v. Edmunds, 94 N. Y. 309, 314; Jackson v. Stiles, 1 Cow. (N. Y.) 575; Thayer v. United Brethren, 20 Pa. St. 62; Towne v. Butterfield, 97 Mass. 105.

309, 315; Jackson v. Davis, 5 Cow.

<sup>60</sup> Whiting v. Edmunds, 94 N. Y. (N. Y.) 129; Sunds v. Hughes, 53 N. Y. 293. This is true even where

a grantee of the fee of the demised premises in complete ignorance of the fact that his grantor was a tenant, for the grantee takes only such interest as his grantor had though the grantor claims to own the fee. Whiting v. Edmunds, 94 N. Y. 309, 314.

<sup>61</sup> Carothers v. Covington (Tex. 1894), 27 S. W. Rep. 1040, 1041.

<sup>62</sup> Howell v. Behler, 41 W. Va. 610, 24 S. E. Rep. 646.

ing the term had repudiated the relationship, denied the title and attorned to a third person provided the lessor recovered possession from the lessee by an appropriate action.<sup>63</sup> The possession of the tenant is presumed to be the possession of the landlord unless the tenant shall actually claim and establish an adverse possession. Hence, it follows as a matter of evidence that one who claims title to land may also show as evidence of his possession that he had either personally or by his agent rented the land in question to another person,<sup>64</sup> or that by an agreement a tenant of his grantor or predecessor in title continued in possession as his tenant.<sup>65</sup> So, where one claims as heir of a person who held by adverse possession, the claimant may show his possession by continuing in the occupation of the premises a tenant of the ancestor and this occupation inures to his benefit.<sup>66</sup> But the mere execution of a lease of land by one claiming title thereto does not constitute an actual possession if the lessee does not actually go into possession. The possession enures to the benefit of the landlord only from the date of the beginning of an actual occupancy.<sup>67</sup> There can be no actual possession by the tenant which shall be beneficial to the landlord where the lessee suffers the land to remain unoccupied and unused during the whole term of the lease.<sup>68</sup>

**§ 574. Tacking possession of several tenants.** The possession of a tenant which will inure to a landlord to constitute a title in the latter by adverse possession need not be the continuous

<sup>63</sup> Coyle v. Franklin, 54 Fed. Rep. 644, 4 C. C. A. 538, 13 U. S. App. 81.

<sup>64</sup> Jay v. Stein, 49 Ala. 514.

<sup>65</sup> Alabama Land Co. v. Kyle, 99 Ala. 474, 13 So. Rep. 43.

<sup>66</sup> William v. McAliley, Cheves (S. C.) 20.

<sup>67</sup> For other cases in which it has been held that the possession of the tenants enures to the landlord, see Brooks v. Rogers, 101 Ala. 111, 13 So. Rep. 386, 390; Balser v. Barcraft, 76 Ala. 414; Doolan v. McCauley, 66 Cal. 476, 478, 6 Pac. Rep. 130; Ehrman v. Mayer, 57 Md. 612, 624; Van Wickles v. Alpaugh, 3 N. J. Law, 446;

Taylor v. Kelly, 56 N. C. 240; Lamme v. Dodson, 4 Mont. 560, 2 Pac. Rep. 298; Van Blarcom v. Kip, 26 N. J. Law, 351; De Lancey v. Ganong, 9 N. Y. 9; Benlow v. New York Floating Dry Dock Co., 112 N. Y. 263, 19 N. E. Rep. 800, 2 L. R. A. 629; Church v. Schoonmaker, 115 N. Y. 570, 572, 22 N. E. Rep. 575; Hartzog v. Hubbard, 19 N. C. 241; Hodgkin v. McVeigh, 86 Va. 751, 10 S. E. Rep. 1065; Gunsolus v. Lormer, 54 Wis. 630, 633, 12 N. W. Rep. 62.

<sup>68</sup> Beasley v. Clarke, 102 Ala. 254, 14 So. 744; Sealey v. Maris (Tex. 1894), 29 S. W. Rep. 828.

and uninterrupted possession of one tenant. The landlord may tack the successive possession of two or more tenants to make up the period required under the statute,<sup>69</sup> for it is by no means indispensable that the same tenant should enjoy possession for the whole time.<sup>70</sup> Inasmuch as the possession of a claimant to land under color of title must be continuous where the plaintiff in an action to sustain adverse possession undertakes to tack to his possession that of his tenant it must clearly appear that the landlord continued to exercise acts of possession over the premises from the time he ceased to occupy the land until the occupation of his tenant commenced.<sup>70a</sup>

**§ 575. Encroachments by a tenant on the land of strangers to the lease.** If a tenant, while in the possession of the premises encroaches upon land which is either adjacent or contiguous to the demised premises and by enclosing such land, acquires a prescriptive title thereto, it will be presumed, in the absence of evidence to the contrary, that he so acted not in his own interest but in that of his landlord. He is under these circumstances merely the agent of his landlord and his adverse possession injures to his principal after the lease is terminated. And from the presumption of law that he does it as agent for his landlord it follows that he will have to surrender to his landlord the land gained by such encroachment at the end of the term as a part of the demised premises. This presumption is not rebutted by the fact that the landlord expressly assented to the enclosure being made.<sup>71</sup> It will be always presumed that encroachments made by a tenant, are made for the benefit of his landlord unless it appears clearly by some evidence that at the time of the making of the encroachment the tenant intended they should be for his own benefit,<sup>72</sup> unless the tenant does some act during the term disclaiming his landlord's title.<sup>73</sup> This

<sup>69</sup> Alexander v. Gibbon, 118 N. C. 796, 24 S. E. Rep. 748; Johnson v. McMillan, 1 Strob. (S. C.) 143; McAuliff v. Parker, 10 Wash. 141, 38 Pac. Rep. 744.

<sup>70</sup> Sims v. Eastland, 3 Head (Tenn.) 368.

<sup>70a</sup> Bank of Virginia v. Hedges, 38 Tex. 614.

<sup>71</sup> Whitmore v. Humphries, 41 L.

J. C. P. 43, L. R. 7 C. P. 1, 25 L. T. 496, 20 W. R. 79; Andrews v. Hailes, 2 El. & Bl. 349, 22 L. J. Q. B. 409, 17 Jur. 761, 1 W. R. 366.

<sup>72</sup> Doe d. Lewis v. Rees, 6 C. & P. 610; Doe d. Croft v. Tidbury, 14 C. B. 304, 2 C. L. R. 347, 23 L. J. P. 57, 18 Jur. 468.

<sup>73</sup> Kingsmill v. Millard, 11 Ex. 313, 3 C. L. R. 1022.

presumption is recognized whether the tenant encloses land which is adjacent to or distant from the demised premises and whether the land be part of a waste, or belong to the landlord or to a third person. The presumption is not rebutted by the fact that the land taken by the encroachment is separated by a brook or a highway or a strip of land from that which the tenant occupies. To bring a case under the rule, it is sufficient that the land be near to it and it need not be immediately adjacent.<sup>74</sup> Thus, a tenant at will and even a tenant from year to year may during the term acquire a permanent interest by encroachment in the lands of other persons and the use of the land thus gained is the tenant's during his term, and on his surrender, passes to the landlord. But the presumption that a tenant's adverse possession enures to the landlord upon the expiration of the term may be rebutted by proof of a contrary intention on the part of the tenant.<sup>75</sup> And while the presumption may be recognized as between the landlord and the tenant, it may not be permitted to prevail as against third persons.<sup>76</sup> So, where a tenant by a contract secures for his own use during the term some interest in or title to the use of the land of a stranger to the lease which relates exclusively to the use which he is entitled to make of the property during the term his right or interest, if permanent, when the term is at an end enures to his landlord without any obligation on the part of the latter to remunerate tenant unless it has

<sup>74</sup> Lisburne (Earl) v. Davis, 1 H. & R. 172, 35 L. J. C. P. 193, L. R. 1 C. P. 259, 12 Jur. (N. S.) 340, 13 L. 795, 14 W. E. 333. A different rule has also been stated and it has been held that the doctrine that land encroached upon by a tenant during the term is for the benefit of the landlord, is confined to cases where the land occupied is waste land and to cases where it is adjoining or adjacent to the leased land. The presumption that the encroachment by the tenant is not for his own benefit but for the benefit of the landlord is never applicable where the land encroached upon is some distance removed from

that which has been demised by the tenant. Lewis v. Stephenson, 67 L. J. Q. B. 296, 78 L. T. 165; Attorney General v. Tomline, 43 L. T. Rep. 486, 15 Ch. Div. 150; Earl of Lisburne v. Davies, 13 L. T. 795, L. Rep. 1 C. P. 259; Kingsmill v. Millard, 11 Ex. 313; Andrews v. Hailes, 2 El. & Bl. 349.

<sup>75</sup> Dempsey v. Kipp, 61 N. Y. 462, 470; Doe v. Jones, 15 M. & W. 580; Doe v. Rees, 6 Car. & P. 610; Andrews v. Hailes, 2 El. & Black. 349; Lisburne v. Davies, L. R. 1 C. P. 260; Kingsmill v. Millard, 11 Exch. 313.

<sup>76</sup> Doe d. Baddeley v. Massey, 17 Q. B. 373, 20 L. J. Q. B. 434, 15 Jur. 1031.

been expressly agreed that he shall do so.<sup>77</sup> A tenant who with the permission of the landlord builds a house on land adjoining the demised premises where he remains for several years, but paying no rent for the extra land, will by implication, be regarded as holding this land upon the same terms and covenants as the land demised to him. Where he has agreed to repair and to keep in repair the land expressly demised, he will by implication be compelled to do the same with the house that he has built on the land adjoining. On the other hand, the landlord will not be entitled to evict him from the premises during the term where relying on the landlord's consent to the occupation, he has spent money in building thereon.<sup>78</sup>

**§ 576. The creation of easements by the lessee.** A lessee of the premises may during the continuance of his term, unless restrained by the covenants of the lease, grant to others a right of passage over the land which would constitute an easement valid and running with the land during the term.<sup>79</sup> Such a grant is subordinate to the lessor's title and will not constitute a disclaimer by the tenant nor initiate an adverse possession either in him or in any other person. An easement of this character may be created by a lessee in favor of any other estate, though the latter estate may be an estate of freehold or an estate less than freehold. The fact that the servient or dominant estates are terms for life or terms for years does not in any way affect the character of the easement, or the rights of the owners of either estate except so far as the temporary character of the estates limit the duration of the easement and render its existence contingent and uncertain and its termination more or less unexpected. If the dominant estate is a terminable estate, the easement will terminate when that estate is at an end. If the servient estate is an estate of a similar character as it would

<sup>77</sup> Dempsey v. Kipp, 61 N. Y. 462, 470, reversing 62 Barb. (N. Y.) 311.

<sup>78</sup> White v. Wakeley, 26 Beav. 17, 28 L. J. Ch. 77, 4 Jur. (N. S.) 988, 6 W. R. 791. Thus a mere license by the lessor allowing the lessee to extend his occupancy of lands beyond the boundaries of the land demised in the lease is not

material and is therefore inadmissible as evidence of adverse possession unless it is also shown that in pursuance of such license the tenant did in fact enter upon the lands. Mason v. Wolff, 40 Cal. 246.

<sup>79</sup> Newhoff v. Mayo, 48 N. J. Eq. 619, 623, 23 Atl. Rep. 205, 27 Am. St. Rep. 455.

be in the case of an easement created by a lessee, the easement will terminate when the servient estate is at an end. In other words an easement in the demised premises created by the lessee during the term expires with the term unless it shall be extended in point of duration by the owner of the fee.

**§ 577. The effect of a disclaimer by the tenant.** In many of the cases it has been held that before the tenant can assert a title in himself to the premises adverse to the landlord, he must surrender the possession of the premises to the landlord. In other words, by these cases it is held that the statute of limitation will not run in favor of the tenant and against the landlord until he has surrendered his possession. These cases are based upon the principle that the tenant is estopped to deny his landlord's title while he is in the possession and while they are very numerous,<sup>80</sup> yet the rule sustained by them is by no means universal. Of course there can be no question that a tenant, after he has surrendered possession and the lease is at an end by the acceptance of that surrender, may purchase an outstanding title and assert it against the landlord; and that prior thereto, his possession of the demised premises will, in the absence of contrary proof, be presumed to be the possession of his landlord. The presumption, however, which has just been stated is never conclusive and there are a multitude of well

<sup>80</sup> Robinson v. Root, 90 Ala. 115, 7 So. Rep. 441; Houston v. Farris, 71 Ala. 570; Caldwell v. Smith, 77 Ala. 167; Norwood v. Kirby, 70 Ala. 397; Barlow v. Dahm, 97 Ala. 414, 12 So. Rep. 293, 294, 38 Am. St. Rep. 192; Sawyer v. Sargent (Cal. 1885), 7 Pac. Rep. 120; Williams v. Garrison, 29 Ga. 503; Newton v. Roe, 33 Ga. 163; Brown v. Keller, 32 Ill. 151, 153, 83 Am. Dec. 258; Lowe v. Emerson, 48 Ill. 160; Hodges v. Shields, 18 B. Mon. (Ky.) 828, 832; Metoyer v. Larenandier, 6 Rob. (La.) 139; Moshier v. Reding, 12 Me. 478, 481; Miller v. Lang, 99 Mass. 12, 13; Ryerson v. Eldred, 18 Mich. 12, 22, 23; Holman v. Bonner, 63 Miss. 131, 134; Perkins v. Potts,

52 Neb. 110, 71 N. W. Rep. 1017; Shields v. Horback, 49 Neb. 262, 68 N. W. Rep. 524; Hagar v. Wiroff, 2 Okl. 580, 39 Pac. Rep. 281; Henning v. Warner, 109 N. C. 406, 411, 14 S. E. Rep. 317; Farmer v. Pickens, 83 N. C. 549, 553; Koons v. Steele, 19 Pa. St. 203; Porter v. Mayfield, 21 Pa. St. 264; Floyd v. Ministry, 7 Rich. Law. (S. C.) 181; Millhouse v. Patrick, 6 Rich. Law (S. C.) 350; Watson v. Smith, 10 Yerg. (Tenn.) 476; Lyles v. Murphy, 38 Tex. 75; Casey v. Hanrick, 69 Tex. 44, 6 S. W. Rep. 405; Emerick v. Tavener, 9 Gratt. (Va.) 220, 58 Am. Dec. 217; Reed v. Shepley, 6 Vt. 602, 607.

considered cases in various jurisdictions which sustain the proposition that a disclaimer and disavowal of the relationship of landlord and tenant by the tenant, with proof of notice thereof to the landlord, will constitute such an ouster by the tenant as to set running the statute of limitations even though the tenant still continues in possession.<sup>81</sup> Under such circumstances the landlord may elect whether to treat the conduct of the tenant as an ouster and his action in failing to take prompt measures to bring about the removal of the tenant and to regain possession himself will be presumed to prove that the tenant has been holding adversely. But the act of a tenant disclaiming the title of his landlord and admitting title in a stranger does not affect the title of his landlord if the landlord have no knowledge of or does not acquiesce in such act.<sup>82</sup> For unquestionably a tenant's disclaimer must be brought to the knowledge of the landlord in order to start the running of adverse possession in the tenant.<sup>83</sup> And the statute of limitations begins to run in favor

<sup>81</sup> *Mauldin v. Cox*, 67 Cal. 387, 394, 7 Pac. Rep. 804; *De Frieze v. Quint*, 94 Cal. 662, 663, 30 Pac. Rep. 1; *Austin v. Wilson*, 46 Iowa, 362, 364; *Goodman v. Malcolm*, 5 Kan. App. 285, 48 Pac. Rep. 439; *Holman v. Bonner*, 63 Miss. 131, 134; *Greenwood v. Moore*, 79 Miss. 201, 30 So. Rep. 609; *Alderson v. Marshall*, 7 Mont. 288, 16 Pac. Rep. 576; *Bedlow v. New York Floating Dry Dock Co.*, 112 N. Y. 263, 286, 19 N. E. Rep. 800, 2 L. R. A. 629; *Whiting v. Edmunds*, 94 N. Y. 309, 314; *McGinnis v. Porter*, 20 Pa. St. 80, 83; *Floyd v. Mintzry*, 7 Rich. Law (S. C.) 181, 189; *Duke v. Harper*, 6 Yerg. (Tenn.) 280, 287, 27 Am. Dec. 462; *Trustees v. Jennings*, 40 S. C. 168, 18 S. E. Rep. 256, 891; *Stacy v. Bostwick*, 48 Vt. 192, 199; *Allen v. Paul*, 24 Gratt. (Va.) 332, 341; *Genin v. Ingersoll*, 2 W. Va. 558, 567; *Voss v. King*, 33 W. Va. 236, 10 S. E. Rep. 402. That a disclaimer by the tenant dispenses

with notice to quit and authorizes a landlord to bring ejectment, see *Doe d. Grubb v. Grubb*, 10 B. & C. 816; *Doe d. Calvert v. Frowd*, 4 Bing. 557; *Hunt v. Allgood*, 10 C. B. (N. S.) 253, 30 L. J. C. P. 313, 4 L. T. 215, 9 W. R. 531; *Vivian v. Moat*, 50 L. J. Ch. 331, 16 Ch. D. 730, 44 L. T. 210, 29 W. R. 504.

<sup>82</sup> *Hovendin v. Annesley*, 2 Sch. & Lef. 624, 9 R. R. 119.

<sup>83</sup> *Wells v. Sheerer*, 78 Ala. 142, 147; *Ponder v. Cheaves*, 104 Ala. 306, 16 So. Rep. 145; *Millett v. Lagomarsino* (Cal.), 39 Pac. Rep. 308, 310; *De Frieze v. Quint*, 94 Cal. 662, 663, 30 Pac. Rep. 1; *Mauldin v. Cox*, 67 Cal. 387, 394, 7 Pac. Rep. 804; *Wilkins v. Pensacola City Co.*, 36 Fla. 36, 18 So. Rep. 20, 26; *Austin v. Wilson*, 46 Iowa, 362, 364; *Patterson v. Hansel*, 4 Bush (Ky.) 654; *Holman v. Bonner*, 63 Miss. 131, 134; *Whiting v. Edmunds*, 94 N. Y. 309, 314, 317; *Bedlow v. New York Floating D. D. Co.*, 112 N. Y. 263, 286,

of the tenant from the date that the adverse claim of the tenant is made known to the landlord.<sup>84</sup> The principal difficulty in this class of cases is for the court to determine upon the facts of the particular case whether there has been a disclaimer. The intention of the tenant is the main issue. This may be inferred from his words or from his conduct. Where the meaning of his language is clear and the fact of his having used the words is undisputed whether they constitute a disclaimer of the title of the landlord is a question of law. If it is denied that the tenant used the language which, if it were used, would be a disclaimer, the question is for the jury.<sup>85</sup> It has been held that conduct on the part of a tenant in surrendering the premises is not necessarily a disclaimer,<sup>86</sup> though a surrender alone to one claiming adversely to the landlord may be a disclaimer. Indeed, there is considerable difficulty in determining on the circumstances of the case what constitutes a disclaimer. The mere abandonment of the premises is certainly not a disclaimer. There must be some act or declaration on the part of the tenant at or after the desertion of the premises which would indicate that he claims the title as against the landlord for himself or

19 N. E. Rep. 800, 2 L. R. A. 629; McGinnis v. Porter, 20 Pa. St. 80, 83; Brandon v. Bannon, 38 Pa. St. 63; Calhoun v. Perrin, 2 Brew. (S. C.) 245, 247; Floyd v. Mintzey, 7 Rich. Law. (S. C.) 181, 189; Duke v. Harper, 6 Yerg. (Tenn.) 280, 287, 27 Am. Dec. 462; Watson v. Smith's Lessee, 10 Yerg. (Tenn.) 476; Lea's Lessee v. Netherton, 9 Yerg. (Tenn.) 315; Stacy v. Bostwick, 48 Vt. 192, 199; Allen v. Paul, 24 Gratt. (Va.) 332, 341; Genin v. Ingersoll, 2 W. Va. 558, 567.

<sup>84</sup> Duke v. Harper, 6 Yerg. (Tenn.) 280, 27 Am. Dec. 462; Lea's Lessee v. Netherton, 9 Yerg. (Tenn.) 315; Greenwood v. Moore, 79 Miss. 201, 30 So. Rep. 609.

<sup>85</sup> "A disclaimer as the word imports must be a renunciation by

the party of his character as tenant, either by setting up a title in another or by claiming title in himself." Doe d. Williams v. Cooper, 1 Man. & G. 135, 139, approved in Jones v. Mills, 10 C. B. N. S. 788; 796. In order to make either a verbal or written disclaimer, it must amount to a direct repudiation of the relation of landlord and tenant, or to a distinct claim to hold possession of the estate upon a ground wholly inconsistent with the existence of that relation, which by necessary implication is a repudiation of it." Doe d. Gray v. Stannion, 1 M. & W. 695, approved in Vivian v. Moat, 50 L. J. Ch. 331, 16 Ch. D. 730, 44 L. T. 210, 29 W. R. 504.

<sup>86</sup> Ackland v. Lutley, 9 A. & E. 879, 894, 1 P. & D. 636, 8 L. J. Q. B. 164.

for some third person. Thus, the act of a tenant abandoning the premises and delivering the possession thereof to a stranger who claims adversely to the lessor with an intent on the part of the tenant to aid or assist the stranger in maintaining his title is such an act of treachery to the landlord and such a repudiation between the landlord and tenant as will constitute a disclaimer. The landlord may infer the tenant is adverse and maintain ejectment without the service of the notice to quit.<sup>87</sup> But the payment of the rent by the tenant to a stranger while he continues in possession<sup>88</sup> is not a disclaimer. For in both of these cases there is nothing from which any claim to the title on the part of the tenant or for another can be inferred. On the other hand, a statement by a tenant to his landlord who was a trustee that the beneficiary of the trust had promised that he should not be removed which was made when the trustee served him with the notice to quit taken with a statement that the beneficiary had told him that he might continue to hold his tenant from year to year while it is not evidence of an express disclaimer, may be sufficient to enable the trustee to maintain ejectment.<sup>89</sup>

**§ 578. The attornment of a tenant to a stranger.** The act of a tenant attorning to a stranger to the title and paying rent to him in connection with other circumstances, may be a disclaimer; but the attornment to the stranger does not alone turn

<sup>87</sup> Doe d. Ellerbrock v. Flynn, 1 C. M. & R. 137, 4 Tyr. 619, 3 L. J. Ex. 221.

<sup>88</sup> Doe d. Dillon v. Parker, Gow. 180, 21 R. R. 827. If the declaration by the tenant to his landlord, "I will not pay you the rent you ask for but will compel you to take less," is not a disclaimer. Hunt v. Allgood, 10 C. B. (N. S.) 253, 30 L. J. C. P. 313, 4 L. T. 215, 9 W. R. 536.

<sup>89</sup> Doe d. Davies v. Evans, 9 M. & W. 48, 11 L. J. Ex. 9. "It is now fully established that whenever the relation of landlord and tenant is terminated by any hostile act, such as the conveyance of the lands demised to the tenant

for years, during such term, to another in fee simple, it becomes the bounden duty of the landlord to protect his title by regaining possession; that the statute of limitations cuts no figure as affording a protection against the rights of the landlord, for the simple reason that statutes of limitation only apply to those instances where the possession is tortious *ab initio* whereas in the other instance we shall hereafter unfold the possession *ab initio* is not tortious." By Pope, J., in Wadsworthville Poor School v. Jennings, 40 S. C. 168, 18 S. E. Rep. 257, 42 Am. St. Rep. 854.

the possession of the tenant into an adverse possession as against the landlord at least, until the landlord has actual notice of the attornment. A landlord has a right to presume that the tenant is holding under his title until he has knowledge that the tenant claims to be holding under the title of the stranger. As soon as the landlord receives notice of the tenant's attornment to the stranger he may elect whether he will thereafter treat the tenant as holding adversely to him or not.<sup>90</sup> For the tenant cannot, while he is in possession of the premises, change the character of that possession as regards his landlord and oust the landlord by merely purchasing or leasing from a third person. He must do some act in addition to this by which it is clearly apparent that the tenant is holding adversely to the landlord. For the attornment to a stranger may not alone operate as a disseizin even when it is brought to the knowledge of the landlord unless there are other acts which constitute an actual disseizin. Hence if with an attornment of a tenant to the stranger, possession by him or by the stranger is assumed with a full knowledge in the landlord of such acts and of the attornment, an adverse possession in the tenant commences.<sup>90a</sup>

**§ 579. What constitutes an actual ouster by the tenant.** What conduct upon the part of the tenant towards the landlord shall be considered as an ouster which shall initiate an adverse holding on the part of the tenant is almost wholly a matter which is to be determined upon the special facts and circumstances of each case. Nevertheless, a few general rules or propositions of law may be stated which are generally applicable to the cases.<sup>91</sup> The tenant who disavows his landlord's title and claims for himself or for another person thereby forfeits his lease and title. The landlord may thereupon at once elect either to proceed against him as a trespasser by ejectment or may

<sup>90</sup> De Jarnette v. McDaniel, 93 Ala. 215, 9 So. Rep. 570, 572; Lucas v. Daniels, 34 Ala. 188; Buckner v. Chambliss, 30 Ga. 652; Blue v. Sayre, 2 Dana (Ky.) 213; Jackson v. Miller, 6 Cow. (N. Y.) 751; Stearns v. Godfrey, 16 Me. 158, 161.

<sup>90a</sup> Winn v. Strickland, 34 Fla. 610, 16 So. Rep. 606, 616; Gallag-

her v. Connell, 23 Neb. 391, 36 N. W. Rep. 563.

<sup>91</sup> What act of a tenant shall be evidence of a holding adverse to the tenant which shall set running the statute of limitations annulling the title of the landlord, requires a careful inquiry to ascertain. Duke v. Harper, 6 Yerg. (Tenn.) 280, 285, 27 Am. Dec. 462.

continue to treat him as a tenant and recover rent for use and occupation. If, after his disavowal, the tenant prevents or attempts to prevent the entry of the landlord, it is an actual ouster of the landlord by which the tenant begins an adverse holding against his landlord which by the operation of the statute of limitations may, by the efflux of time, ripen into a title in the tenant. For an actual ouster of the landlord by the tenant need not be accompanied by force and according to the modern authorities what will constitute an actual ouster of the landlord is in most instances a question of fact to be determined on all the facts and circumstances.<sup>92</sup> Thus, a conveyance of the fee by a tenant to a third person does not alone enable the latter to claim by adverse possession though, when he received the conveyance, he had no knowledge that the grantee was a lessee. If he enters in possession under such a deed, it will be presumed that he is in possession as a tenant until he shall actually or by implication disavow and repudiate the title of the true owner and give him notice of such disavowal as is required in the case of a tenant holding adversely to his landlord. When the relation of landlord and tenant is proved to have existed, the obligations of the tenant to respect and admit the validity of the landlord's title will be transferred to every one entering into possession through the tenant even where the former actually believes he is the owner of the fee by the conveyance from the tenant so long as he remains silent as regards the landlord's title.<sup>93</sup> It will be presumed that the person to

<sup>92</sup> Duke v. Harper, 6 Yerg. (Tenn.) 280, 286, 27 Am. Dec. 462.

<sup>93</sup> Jackson v. Davis, 5 Cow. 123, 130, 15 Am. Dec. 451; Jackson v. Scissam, 3 Johns. (N. Y.) 499; Campbell v. Shipley, 41 Md. 81, 96; Sanders v. Lord Annesley, 2 Sch. & Lef. 106, compare Trustees of Wadsworthville Poor School v. Jennings, 40 S. C. 168, 18 S. E. Rep. 257, 891; Mackin v. Haven, 88 Ill. App. 434, affirming 187 Ill. 480, 58 N. E. Rep. 448. A conveyance by the lessee during his term purporting to convey the fee cannot operate as a valid paper title

upon which the grantee named in the conveyance can base an adverse possession. The tenant can assign only such interest as he has and his assignee will take no more by any assignment made during the term. The landlord may maintain ejectment against the assignee of the lessee after the term has expired, or if he can do so peaceably he may enter upon the premises and oust the assignee at once on its expiration. Wadsworthville Poor School v. Jennings, 40 S. C. 168, 18 S. E. Rep. 257, 260, 891, 42 Am. St. Rep. 854.

whom the tenant has conveyed or has delivered possession is continuing to hold of the landlord until the contrary appears. For the presumption, though strong, is never absolutely conclusive or irrebuttable and may be overcome by proof of such notorious and unequivocal acts of exclusion as regards the landlord as will constitute an actual ouster.<sup>94</sup> What acts on the part of the tenant or his assignee shall constitute an ouster is a question of much difficulty depending on the facts and circumstances in each case. The mere maintenance by the assignee of an enclosure about the land erected by the lessee is not material as it will be presumed that the fence was originally erected to enable the lessee to properly enjoy the land and that it was continued by the assignee for the same purpose.<sup>95</sup> Where it is proved that the relation of landlord and tenant has once existed the mere non-payment of rent, though no demand has been made for it by the landlord is not alone sufficient to defeat the title of the landlord or to create an adverse possession in the tenant. The failure to demand rent for a long period may prevent the landlord from collecting it for the future but such failure on his part, however long continued, creates no title to the land in the tenant in the absence of a disavowal of title and such actions on the part of the tenant as will establish an open and notorious hostile possession on his part.<sup>96</sup>

<sup>94</sup> *Campbell v. Shipley*, 41 Md. 81, 96.

<sup>95</sup> *Gwynn v. Jones*, 2 G. & J. (Md.) 184. In the case of *Peyton v. Stith*, 5 Peters (U. S.) 484, on p. 491, the court said: "In the case of *Willison v. Watkins*, 3 Peters, 44, decided at the last term, this court considered and declared the law to be settled, that a purchase by a tenant of an adverse title, claiming under or attorneying to it, or any other disclaimer of tenure, with the knowledge of his landlord, was a forfeiture of his term; that his possession became so far adverse that the act of limitation could begin to run in his favor from the time of such forfeiture, and the landlord could

sustain ejectment against him without notice to quit at any time before the period prescribed by the statute had expired by the mere force of the tenure, without any other evidence than the proof of the tenancy; but he could in no case contest the right of the landlord to possession, or defend himself by any claim or title adverse to him, during the time which the statute had to run. If the landlord suffers it to run out without making an entry, or bringing a suit, each party may stand upon their right; but until then the possession of the tenant is the possession of the landlord."

<sup>96</sup> *Ehrman v. Mayer*, 57 Md. 612, 624; *Campbell v. Shipley*, 41 Md.

§ 580. What constitutes adverse possession by the tenant as against his landlord. The possession of the tenant in order to constitute an adverse possession as against the landlord must contain the same elements as are ordinarily present where any person claims to hold by adverse possession. It must be open and notorious as regards the landlord to the extent that he may reasonably be presumed to know that his tenant is holding adversely. There must usually be a visible occupation of the land by the tenant or by his agent or servant. The possession also must be exclusive of any claim on the part of the landlord. It must also be continuous and uninterrupted and be maintained under a positive claim of ownership in the tenant as against the landlord. There must be a positive and continued disclaimer by a tenant of a landlord's title brought home to the landlord together with the assertion of an adverse right in order to convert a tenancy into adverse possession.<sup>97</sup> A tenant in order to acquire title by adverse possession must with the knowledge of the true owner, openly and explicitly disclaim any holding under his former landlord and unreservedly assert that he is the owner of the true title.<sup>98</sup> The fact of a disclaimer and disavowal of the title of the landlord by the tenant and the fact that knowledge of the adverse claim of the tenant has been brought home to the landlord must be clearly and convincingly shown. The court must be satisfied that the landlord has had notice of the adverse possession of the tenant but this fact of

81. "Payment is presumed, after a great lapse of time in analogy to, and upon the principle of the statute of limitations; because the evidence of the fact may reasonably be presumed to be lost. But where the relation of landlord and tenant is once established, under a sealed lease, the mere circumstance that the landlord has not demanded the rent cannot justify the presumption that he has extinguished his right to it, by a conveyance of the interest in remainder or reversion to the tenant. The presumption sought to be indulged in this case is not a

presumption of law, which cannot be contradicted, but is a presumption in the nature of evidence; but mere length of time will never raise such presumption. It must arise from some facts or circumstances which took place within the time." By the court in *Jackson v. Davis*, 5 Cow. (N. Y.) 123, on p. 131.

<sup>97</sup> *Morris v. Wheat*, 11 App. D. C. 201, 25 Wash. L. Rep. 494; *Neff v. Hyman*, 100 Va. 521, 42 S. E. Rep. 314; *Greenwood v. Moore*, 79 Miss. 201, 30 So. Rep. 609.

<sup>98</sup> *Nessley v. Ladd*, 29 Or. 354.

notice is never required to be proved beyond all reasonable doubt. Stronger and clearer proof may be required in some cases than in others, the degree of proof depending always upon the facts and circumstances of each particular case.<sup>99</sup> The whole doctrine of adverse possession rests almost exclusively upon the presumed acquiescence of the party against whom it is held. He cannot logically be held to acquiesce without knowledge of the fact to which his silence applies. The knowledge need not always be actual knowledge. The tenant may not have to prove that in any particular case he expressly and in so many words told the landlord he was holding the premises adversely and that he claimed a title in himself. The direct fact of an adverse claim and possession on his part may be presumed from collateral facts which would lead or reasonably may lead to the inference of an adverse holding by the tenant. The collateral facts may be of such a nature as to put the landlord on his guard and it will then be his duty, as soon as they have come to his knowledge. The knowledge constitutes an implied to ascertain their true meaning. If he shall not do this he may be presumed to have such a notice of an adverse holding by his tenant as may properly be inferred from the facts which have come to his knowledge. This knowledge constitutes an implied notice to the landlord of an adverse possession by the tenant which may be equivalent, if clearly proved, to an express disclaimer and disavowal of the tenancy by the tenant.<sup>1</sup> The se-

<sup>99</sup> *Reusens v. Lawson*, 91 Va. 226, 21 S. E. Rep. 347, 351.

<sup>1</sup> *Wells v. Sheerer*, 78 Ala. 142, 147. "The law is well settled that a tenant, after the expiration of his lease may disavow and disclaim his tenancy and the title of his landlord, and drive the landlord to his action for the recovery of possession within the period of the statute of limitation, but before any foundation can be claimed for the operation of the statute in such a case, a clear, positive and continued disclaimer and disavowal of the landlord's title, and an assertion of an ad-

verse right must be brought home to the landlord by clear, positive and distinct notice." *Wilkins v. Pensacola City Co.*, 36 Fla. 36, 18 So. Rep. 20, 26. A tenant who remains quietly in possession for a long period without any overt act or declaration to his landlord indicating a hostile holding until possession is demanded of him by the owner cannot then for the first time by mere words, without any facts to sustain them or by a mere silent opinion or determination of his own mind, make his holding adverse to the owner, so as to prevent him from treating

cret declarations of the tenant to members of his own family or to strangers even though publicly uttered to the effect that he was in possession claiming adversely to his landlord, do not affect the landlord's title or confer any rights upon the tenant. They are, therefore, not admissible as evidence of adverse possession in the tenant unless it shall also be unquestionably proved that the repudiation of the tenancy was brought to the notice and knowledge of the landlord.<sup>2</sup> The conveyance of the premises to the lessee by a third party claiming adversely to the lessor during the term and while the lessee is in possession without notice to the lessor of the adverse claim is not such a notice to the lessor as will begin an adverse possession in the lessee.<sup>3</sup> There must be an open and notorious adverse holding by the tenant against the landlord and until the landlord has actual notice of his tenant's adverse claim and of his hostile possession the occupancy of the premises by the tenant will be presumed to be under his lease and consequently in subordination to the title of the landlord.<sup>4</sup> The recording of a conveyance of the premises by a third person to the tenant is not notice of the adverse holding by either the tenant or the grantor. The owner is not a subsequent purchaser or mortgagor under the statutes requiring record and is under no obligation to watch the records for conveyances of his property made by strangers.

**§ 581. The right of the landlord to become a party in an action of ejectment against his tenant.** At the common law and in some cases by modern statute, a landlord is entitled to intervene as a defendant in an action of ejectment, or in an action to try the title of the land, or in any similar action brought against the tenant as a defendant. The reason of this is that inasmuch as the possession of the tenant is the possession of the landlord and operates as the landlord's adverse possession the latter has a right not only to notice of proceedings brought to oust his tenant but the right to defend any such proceedings as the unfavorable termination of such proceedings and the judgment ousting the tenant therein will operate to terminate the

him as a tenant at sufferance if he is holding over after his term has expired. *Hogsett v. Ellis*, 17 Mich. 351, 373.

<sup>2</sup> *Stacy v. Bostwick*, 48 Vt. 192, 199.

<sup>3</sup> *Udell v. Peak*, 70 Tex. 547, 7 S. W. Rep. 786.

<sup>4</sup> *Millett v. Lagomarsino* (Cal. 1894), 38 Pac. Rep. 308, 310; *Sharpe v. Kelly*, 5 Denio (N. Y.) 431.

landlord's title and set running against him a title by adverse possession.<sup>5</sup> The tenant as soon as he is served with ejectment papers is bound with reasonable diligence to notify his landlord that he has been served in order that the latter may intervene and defend him. A tenant who fails to do this cannot himself purchase under the judgment in an action of ejectment as against his landlord.<sup>6</sup> The landlord having received notice and having become a party to the action will be thereafter bound by the judgment as to all issues which were litigated in the action,<sup>7</sup> but the landlord is not estopped from making any defense that the tenant would not have been estopped from making where the statute permits him to be made a party.<sup>8</sup> The tenant may of course defend in the ejectment upon the ground that he is holding adversely to the plaintiff in ejectment under his character as a tenant and that his adverse holding injures to the benefit of his landlord. And the landlord after he intervenes may allege and prove an adverse holding in himself by virtue of the possession of his tenant. Under the statute the landlord who has not been served with notice and who has acquired no knowledge of the action in ejectment brought against his tenant is not bound thereby. The plaintiff in ejectment in omitting to make the landlord a party does so at the risk of having the judgment re-opened on the application of the landlord. Thus, where the landlord has had no knowledge of the action of ejectment having been brought and had therefore no time to secure for himself an opportunity to defend by being made a party he may apply to the court to have the judgment entered therein against his tenant by default, opened and vacated. And when after this is done a new trial is directed the landlord is entitled to be made a party defendant and to defend himself upon the original pleadings.<sup>9</sup> For it is very evident that were the lessor not permitted to defend the action of ejectment brought against his tenant,

<sup>5</sup> Greene v. Klinger, 10 Fed. Rep. 689; Clark v. Stringfellow, 4 Ala. 353 (forcible entry and detainer); McCaskle v. Amerine, 12 Ala. 17; Falkner v. Jones, 12 Ala. 165 (suit by purchaser of tenant's title at sheriff's sale); Jackson v. Allen, 30 Ark. 110; Davidson v. Davidson, 28 La. Ann. 269; Ken-

nedy v. Campbell, 3 Brev. (S. C.) 553 (trespass to try title).

<sup>6</sup> Lowe v. Emerson, 48 Ill. 16.

<sup>7</sup> McCreery v. Everding, 54 Cal. 168. See McCaskle v. Amerine, 12 Ala. 175.

<sup>8</sup> Isler v. Foy, 66 N. C. 547.

<sup>9</sup> King v. Davis, 137 Fed. Rep. 198.

titles to property would be shaken, if not destroyed, by collusive recoveries obtained in actions of ejectment or similar actions brought against tenants without the landlord's knowledge and with perhaps a good defense on his part if he had the knowledge. So, too the landlord not having been made a party to the action is not bound by a decree rendered in a suit for an injunction where the suit for the injunction was brought by the tenant to restrain a third party from interfering with the use the tenant was making of the property. And the decision in such a proceeding as above described to the effect that the premises occupied by the tenant belonged to a third party is not binding on the landlord where he was not a party to the proceedings.<sup>10</sup>

§ 582. When a landlord of a tenant who is a defendant in **ejectment may be ousted**. It has been held that a landlord is not bound, nor can he be ousted under a judgment in ejectment which is rendered against his tenant in a suit in ejectment to which the landlord is not a party. Thus where the landlord has received no notice of the action, does not appear in it, and is guilty of no fault or laches in any way, he cannot be ousted by a writ of possession issued on a judgment against the tenant. And where, under the above circumstances pending the action the tenant surrenders possession to his landlord the latter cannot, on judgment being rendered against the tenant be ousted from possession. In such case a stay of judgment will be granted and a trial had upon the merits.<sup>11</sup> This rule is not recognized in those jurisdictions where provision is made under the various local statutes for the filing of a notice of the pendency of the action by the plaintiff in an action of ejectment. Under such circumstances every person, whether he be the landlord of the premises or a stranger to the title is conclusively presumed to have notice of the pendency of the action and is bound by the judgment and all proceedings therein in case he during the pendency of an action takes title from one who is a party to it. But if a tenant is made a party to an action of ejectment to which his landlord is not a party the latter is bound by the judgment in the action if he has actual knowledge

<sup>10</sup> Orthwein v. Thomas (Ill.), 13 N. E. Rep. 564      <sup>12</sup> Oetgen v. Ross, 47 Ill. 142, 95 Am. Dec. 468.

<sup>11</sup> Powers v. Schoeltens, 79 Mich. 299, 44 N. W. Rep. 613.

of the proceedings and if with such knowledge pending the action the landlord accepts a surrender of the land from his tenant who is a party, the plaintiff may under a judgment in his favor turn out of possession not only the tenant but the landlord as well.<sup>13</sup> Though a statute requiring a tenant to notify his landlord of the beginning of a suit by a stranger to recover possession does not expressly provide that the landlord shall be made a party, it would seem that such is its manifest intention and that the landlord may, on proper application to the court be permitted to be made a party defendant.<sup>14</sup>

**§ 582a. The operation of a judgment in ejectment upon the tenants of the defendant.** A judgment in ejectment to which the landlord of the premises is a party defendant is not binding upon his tenant who was such and who was in possession when the action was begun, unless the tenant is made a party to it and is served with the proper process. Hence a tenant cannot be ousted by a writ of dispossessment under a judgment in ejectment where he was not served with process in the action.<sup>15</sup> But the general rule that a person who, pending an action of ejectment, enters the premises under a conveyance from a party to the action is in privity with him and is presumed to hold under him and consequently is subject to the operation of the judgment in the ejectment applies to one who pending the action becomes a tenant of the defendant in the action.<sup>16</sup> So, a judgment in an action of ejectment is good not only as against a defendant but against all claiming under a lease from him whatever the alleged capacity in which he claimed to act in leasing the premises.

<sup>13</sup> Rodgers v. Bell, 53 Ga. 94. 142; Ford v. Doyle, 37 Cal. 346; See, also, Smith v. Gayle, 58 Ala. 600. Goerges v. Hufschmidt, 44 Mo. 179; Oakes v. Aldridge, 46 Mo.

<sup>14</sup> Walser v. Graham, 45 Mo. App. 629.

<sup>15</sup> Fogarty v. Sparks, 22 Cal. 142; Ford v. Doyle, 37 Cal. 346; Goerges v. Hufschmidt, 44 Mo. 179; Oakes v. Aldridge, 46 Mo.

<sup>16</sup> Mayne v. Jones, 34 Cal. 483.

## CHAPTER XXIV.

### THE OPTION OF A TENANT TO PURCHASE THE PREMISES.

- § 583. The tenant's option to purchase—General considerations.
- 584. The irrevocable character of an option.
- 585. The mutuality of the option.
- 586. The purchase price to be paid by the lessee.
- 587. The option to purchase in the tenant, if not otherwise disposed of, or at price offered by any other person.
- 588. The time within which the option must be exercised.
- 589. The performance of conditions precedent by the lessee.
- 590. The necessity for notice by the lessee to the lessor.
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- 592. When the lessee's option to purchase passes to his assignee.
- 593. The passing of the right of an election from the lessor or to the lessee.
- 594. The disposition of the insurance money when premises are destroyed during the term.
- 595. Equitable relief in the cases of options to purchase—Remedy of the tenant by specific performance.
- 597. Damage for the breach of a covenant to permit the lessee to purchase the premises.

§ 583. **The tenant's option to purchase—General considerations.** A lease of real estate with a privilege therein to the lessee to purchase it within the term, and which also contains specific covenants and stipulations touching the obligations of the parties as lessor and lessee, and also as vendor and vendee in the event of an election to purchase exercised by the lessee is both a lease and an option to purchase and it should receive that construction which will preserve the rights of the parties under the contract in either aspect.<sup>1</sup> In the absence of provisions to the contrary, it should receive a construction which will preserve in full force the obligations and rights of lessor and lessee while that relationship exists, and in like force the obligation of vendor and purchaser after the election to purchase has been exercised and the lease is at an end. The relation of lessor and

<sup>1</sup> Clifford v. Gresslinger, 96 Ga. 789, 22 S. E. Rep. 399.

lessee persists until the option has been exercised, when the optional contract and the lease becomes an absolute contract of sale and is to be construed and enforced as such. After the option has been exercised by the lessee, the right of the lessee to the specific performance of the contract of sale is subject to the same rules and principles of equity as if the writing had been originally a contract of sale and not a lease with an option to buy. The relation of vendor and vendee does not exist until the optional contract has become an absolute contract of sale and thereafter the nature and extent of the rights of the parties are determined by the terms of the contract of sale and the equities growing out of it.<sup>2</sup> A provision that a lessee may buy at the option of the parties clearly means at the option of the lessee. If he seasonably makes known his election to purchase to his lessor and thereafter continues in possession, he is no longer a lessee but a vendee in possession and his holding as regards the owner is not as a tenant but as a vendee of the lessor. Any remedy which the owner may have against him must arise out of and relate to the relation of vendor and vendee.<sup>3</sup> The option in a lessee to purchase the land does not itself alone constitute a sale or transfer any legal title to the land to the lessee until he sees fit to exercise the option. He may never do this and the lessor has no right to compel him to purchase the land. If the lessee elects to purchase and tenders the purchase price, the transaction is then but not until then a sale. Prior to that time the lessee under his option has no legal or equitable title in the land which can be levied on under an execution or which can be assigned or sold to any person separate and distinct from an assignment of the lease itself. But after the lessee has exercised

<sup>2</sup> Gilbert v. Port, 28 Ohio St. 276; Pegg v. Wisden, 16 Beav. 243. An option will not be enforced unless it is clear and complete in its terms. Buckmaster v. Thompson, 36 N. Y. 558. The option may be void where no price is named unless it is provided that the price shall be fixed by appraisal or arbitration. Smoyer v. Roth (Pa. 1888), 13 Atl. Rep. 191; Folsom v. Harr, 218 Ill. 369, 75 N. E. Rep. 987.

<sup>3</sup> Mack v. Dailey, 67 Vt. 90, 92, 30 Atl. Rep. 686.

<sup>4</sup> Bras v. Sheffield, 49 Kan. 702, 709, 31 Pac. Rep. 306, 33 Am. St. Rep. 386. But in Bank of Louisville v. Baumeister, 87 Ky. 6, 7 S. W. Rep. 170, the interest of a lessee having an option to purchase it was held might be mortgaged under a statute providing that any interest in or claim to real estate may be disposed of by deed or will in writing.

his option, the contract between him and his former lessor is a contract of purchase and sale and either party to it may assign his interest in it. Hence, it follows from the fact that the option transfers no legal title that the right of a landlord to recover from a third person for a permanent injury to his property caused by the neglect of such person is not affected in any way by his having given an option to purchase the property to the lessee.<sup>5</sup> For until the sale is consummated by the transfer of the legal title in the reversion to the tenant the landlord is both the legal and equitable owner of the reversion and may exercise his rights as such against third persons to the same extent as any other landlord. A writing called a lease may though one writing under some circumstances be regarded as containing two independent contracts. It is competent for a lessor to lease the property and to give an option to the prospective lessee, to purchase the same by language which shall make these two agreements independent of each other. Such is the case where the owner of property agrees to give a lease as soon as the lessee should build thereon with a provision that if he did not build, it was to be void and he was also to have the option of purchasing the property within a specified period, though it turned out subsequently that the lease was void and forfeited. The tenant was decreed a specific performance of his option on the ground that the right to purchase was separate and distinct from the right to have a lease.<sup>6</sup> Again the option to purchase and the lease itself will be held to be independent agreements where the consideration for the option is separately stated in the lease. The question whether the option is independent from the lease is always a question of intention depending on the construction. The courts will exercise great latitude of construction in holding that the option is independent where this is necessary to protect the tenant's rights under the option from being destroyed by a forfeiture of the lease. Thus, where a lease and the option are independent and separate contracts, the right of the lessee to exercise his option cannot be defeated by the landlord serving a notice to quit which he is entitled to do under the provision terminating the lease, for a breach of cove-

<sup>5</sup> Hayden v. Consolidated Mining & Dredging Co. (Cal. App. 1906). 84 Pac. Rep. 422.

<sup>6</sup> Green v. Low, 22 Beav. 625, 2 Jur. (N. S.) 848, 4 W. R. 669.

nant and if in effect the option is independent of the lease the fact that the landlord had a right to terminate the lease will not affect the option.<sup>7</sup> It is perhaps needless to say that an option to purchase land which is included in the lease cannot by construction be permitted to include land adjoining but not included in it. A lease of a dwelling and lot, with an option in the tenant to buy the same, does not entitle him to buy the land forming the alley on which the house abuts, though an upper story of the house extends over the alley.<sup>8</sup>

**§ 584. The irrevocable character of an option.** The giving and acceptance of an option to buy by the parties to a lease constitute a contract which cannot be revoked by the landlord. And there may be circumstances under which the option being an independent contract between the parties to the lease does not terminate with the lease though the latter may be forfeited by the tenant before the term expires. The giving of a lease with the option in it and its acceptance by the tenant, with his entry upon the premises is a sufficient consideration by both the parties to sustain the option. The option thereby becomes a valid and binding contract on the lessor which he cannot countermand or revoke during the period for which it runs. But when the date on or before which the option must be exercised is reached, the option if not exercised, expires at once by its own limitation, unless it is renewed on a new consideration to the parties to the lease, or unless there are circumstances to the case which are sufficient in equity to excuse the tenant for his failure promptly to exercise the option.<sup>9</sup> For an option in a lease under seal giving the tenant a right to buy the premises under certain circumstances vests in him a complete right to purchase and to compel the landlord to make him a conveyance if he elects to buy upon the terms named in the lease.<sup>10</sup> The mere fact that the tenant endeavors to make better terms with the landlord when the time to exercise the option arrives is not in itself a refusal to exercise the option. The option given in the lease is not a mere offer without consideration which may or may not be accepted and to which a counter proposition is an

<sup>7</sup> *Mathews Slate Co. v. New Empire Slate Co.*, 122 Fed. Rep. 972.

<sup>9</sup> *Tilton v. Stirling Coal Co.*, 28 Utah, 173, 77 Pac. Rep. 758.

<sup>8</sup> *Barnett v. Plummer*, 19 W. N. C. (Pa.) 117, 8 Atl. Rep. 59.

<sup>10</sup> *McCormick v. Stephany*, 61 N. J. Eq. 208, 218, 48 Atl. Rep. 25.

equivalent to a rejection. It is a binding contract which will be enforced in equity.<sup>10a</sup>

**§ 585. The mutuality of the option.** The fact that an option to purchase enjoyed by the lessee is apparently unilateral does not, according to the modern decisions, render it invalid.<sup>11</sup> Indeed as is elsewhere explained, the option is not unilateral as it is sustained by the agreement of the lessee to pay the rent for the premises. Equity will not refuse to compel the specific performance of such a stipulation by the lessor merely because there is apparently no corresponding obligation or covenant in the lease on the part of the lessee to purchase.<sup>12</sup> In other words

<sup>10a</sup>A clause in a lease under seal giving a lessee the right to buy the demised premises at the same price another might be willing to pay is not a mere option or first invitation to purchase, like an offer in a letter to sell property which being without consideration must be accepted in the terms of the offer, and which may be held to be rejected by a counter proposition. Such a clause is a completed purchase of a right to have a conveyance if the purchaser shall elect to buy upon the terms proposed. That the tenant when the time comes for the enforcement of his option demands more than he is in fact entitled to is not a rejection of the option which gives the lessor a right to refuse to perform. McCormick v. Stephany, 61 N. J. Eq. 208, 218. In the same case it was held that an option in the lessee to purchase but not specifying what estate he should take is an agreement to convey an estate in fee if the lessor has such an estate. After the death of a lessor who gave an option it may be enforced against his heirs, but not against his widow in whom dower has vested. She may refuse to convey

her dower estate to the tenant who has the option. Usually in cases of specific performance indemnity against the dower right of a wife will not be decreed unless it be shown that the husband has fraudulently induced the wife to refuse to release her dower. The reason of this is that requiring such an indemnity is a violation of the wife's freedom of choice, inasmuch as the interests of the husband may prompt him unduly to influence the wife. This reason fails where indemnity is sought after the husband's death against the dower right of a widow for the heirs who are required to indemnify are not in a position to influence the widow. McCormick v. Stephany, 61 N. J. Eq. 208, 224, 225, 48 Atl. Rep. 25.

<sup>11</sup> Watts v. Kellar, 56 Fed. Rep. 1, 5 C. C. A. 394; Mathews Slate Co. v. New Empire Slate Co., 122 Fed. Rep. 972, 980; Willard v. Taylor, 8 Wall. (U. S.) 557, 19 Law. ed. 501; Brown v. Slee, 103 U. S. 828, 26 Law. ed. 618; Boston & Me. R. R. Co. v. Bartlett, 3 Cush. (Mass.) 224; Perkins v. Hadsell, 50 Ill. 216.

<sup>12</sup> De Rutte v. Muldrow, 16 Cal. 505.

the lessor is not released from his obligation to sell based upon good and valuable consideration by the fact that the lessee is not bound to buy. A stipulation giving a lessee an option to buy is a continuing offer and an obligation on the part of the lessor running with the lease to sell the property to the lessee which the latter may accept at his option within the time limited.<sup>12a</sup> If the contract for the option is fair and open on sufficient consideration and otherwise valid, it will be unquestionably enforced in equity provided the lessee has exercised the option in due time. The consideration must be sufficient and where the lease is under seal the sufficiency of the consideration will be presumed. Aside from this somewhat antiquated and technical rule the sufficiency of the consideration may always be shown by parol. The payment of rent by the tenant may be a sufficient consideration for the option,<sup>13</sup> as it may with good reason be assumed that the tenant is paying more rent than he would otherwise be willing to pay for the use of the premises in return for the valuable privilege of buying it at some time in the future at a fixed price or of declining to do so according as he sees his profit in doing the one thing or the other.<sup>14</sup>

<sup>12a</sup> King v. Raab, 123 Iowa, 632, 99 N. W. Rep. 306.

<sup>13</sup> Heyward v. Wilmarth, 87 App. Div. 125, 84 N. Y. S. 75.

<sup>14</sup> Wellmaker v. Wheatley, 123 Ga. 201, 51 S. E. Rep. 436; Hayes v. O'Brien, 149 Ill. 403, 37 N. E. Rep. 73, 75; Estes v. Furlong, 59 Ill. 298; Hawralty v. Warren, 18 N. J. Eq. 124, 126; Hall v. Center, 40 Cal. 63; Maughlin v. Perry, 35 Md. 352; Clason v. Bailey, 14 Johns. (N. Y.) 484; Willard v. Tayloe, 8 Wall. (U. S.) 557; Finlen v. Heinze, 31 Mont. 650, 80 Pac. Rep. 918; Hatton v. Gray, 2 Ch. Cases, 164; Seton v. Slade, 7 Ves. 265; Fowle v. Freeman, 9 Ves. 351; Western v. Russell, 3 Ves. & B. 192; Ormond v. Anderson, 2 Ball & B. 370; Backhouse v. Moun-  
hun, 3 Swanst. 434. "The covenant in the lease giving the right

or option to purchase the premises was in the nature of a continuing offer to sell. It was a proposition extending through the period of ten years, and, being under seal, must be regarded as made under a sufficient consideration, and therefore one from which the defendant was not at liberty to recede." Willard v. Tayloe, 8 Wall. (U. S.) 557. "In taking a lease a tenant may be willing to pay a high rent for a number of years provided the landlord will give him an optional right to purchase at a fixed price; and it is not to be presumed that the landlord would agree to such a concession unless he had a consideration in the lease. Any sufficient consideration would make such unilateral contract binding in equity." By the court in Haw-

§ 586. The purchase price to be paid by the lessee. It is always advisable that the price at which the lessee may purchase the demised premises shall be expressly mentioned in the lease. Frequently it happens that this cannot be done either for the reason that the future value of the property is unascertainable, or because the parties to the lease are not willing to agree upon the price which one will take and the other will pay many years in advance of the time when the option may possibly be exercised. A provision giving an option either absolutely or upon the compliance by the tenant with certain conditions is not wanting in mutuality merely because no price is fixed and the tenant is given the right to purchase the property provided he will pay as much as any other person. Such a stipulation does not render the agreement invalid for vagueness, uncertainty or indefiniteness because the price can be readily ascertained by the parties when it is ascertained what any other person will pay for the property.<sup>15</sup> But the option to be valid must either fix the price absolutely or fix some mode of determining the price. It is competent for the parties to the lease to stipulate that the tenant may purchase at a price to be based on a valuation made by appraisers. In England<sup>16</sup> and one or two of the states,<sup>16a</sup> where a sale to a lessee is provided for in a lease, at a valuation to be fixed by appraisal, it has been held that a specific performance of the contract to sell will not be decreed where the appraisers fail to agree upon the price. *A fortiori* this rule would apply with greater force where there was a failure to appraise by reason of a default or a refusal of either or both parties to appoint appraisers or to abide by the decision of appraisers properly appointed. By these authorities an appraisal is regarded as a condition precedent and the option is incomplete and inoperative, and therefore unenforceable in equity, unless an appraisal has been had. The party aggrieved by

rality v. Warren, 18 N. J. Eq. 124. The fact that a lease giving a lessee an option to purchase is not signed by him does not invalidate his option where he has entered into possession and thus has become liable for the rent. White v. Weaver, 68 N. J. Eq. 644, 61 Atl. Rep. 25.

<sup>15</sup> Marske v. Willard, 48 N. E. R. 290, 169 Ill. 276, affirming 68 Ill. App. 290.

<sup>16</sup> Milnes v. Gery, 14 Vesey, 400.

<sup>16a</sup> Greason v. Keteltas, 17 N. Y. 491; Hopkins v. Gilman, 22 Wis. 476.

a refusal or neglect to appraise has therefore only an action at law for damages for the refusal to make an appraisal. This rule, however, particularly in the United States is confined to cases where the parties can be easily placed in *statu quo*, or where an action for damages will furnish an adequate remedy. And if from the language of the option the mode of ascertaining the price by an appraisal is clearly non-essential and merely a suggestion, the option will be enforced and a sale decreed at a fair and reasonable price to be ascertained by a reference to a master or some other judicial officer, or to a person who is skilled in valuing property or by the court itself upon proper testimony as to the value of the property.<sup>17</sup> So, an agreement that the lessee shall have the privilege of purchasing the property "at a fair price" or "for a fair valuation," is valid. The court may appoint appraisers to ascertain what is a fair valuation or may refer the question of value to a master or other officer.<sup>18</sup> But where no price or value is mentioned and where no method of ascertaining the value can be discovered to have been contemplated by the parties the option is incomplete and will not be enforced.<sup>19</sup> If the price is fair and adequate at the date

<sup>17</sup> Coles v. Peck, 96 Ind. 333, 341, 49 Am. Rep. 161, citing Tscheider v. Biddle, 4 Dill. (U. S.) 55. See, also, Lister Agricultural Chemical Works v. Selby, 68 N. J. Eq. 271, 59 Atl. Rep. 247.

<sup>18</sup> Lister Agricultural Chemical Works v. Selby, 68 N. J. Eq. 271, 278, in which the court said: "The property is to be taken at a fair valuation—that is, at its fair market price. This price is, as it necessarily must be, unless the parties agree upon it, to be ascertained by judicial methods." In Domestic Telegraph Co. v. Metropolitan Telephone Co., 39 N. J. Eq. 160, affirmed in 40 N. J. Eq. 287, it was said: "When the parties have agreed that the land shall be conveyed not upon a price to be agreed upon themselves, but at a fair price or at a fair valuation, there the parties having fixed a standard or measure of value

without having designated any particular method for ascertaining the price, the court may, without making a contract, ascertain the price according to the standard fixed by the contract and enforce the contract. And in Van Doren v. Robinson, 16 N. J. Eq. 256, where the agreement was to convey at a fair price, it was said: "In this case the mode in which the price shall be fixed is not designated by the contract. It is required simply that it be a fair price. To ascertain that value by any mode of investigation will conflict neither with the letter nor with the spirit of the contract. I think therefore the contract is such as will justify a decree of specific performance." See, also, Jackson v. Jackson, 19 E. L. & Eq. 546.

<sup>19</sup> In this case the general principle was laid down that the op-

of the lease, any change subsequently occurring in the value of the property without fault of either party will excuse neither from complying with the contract.<sup>20</sup> The parties take upon themselves the risk of subsequent fluctuations in value and such fluctuations are not permitted to prevent specific performance.<sup>21</sup> But there are some circumstances occurring between the execution of the lease and the date when the option is exercised which a court of equity will take into consideration in a suit for the specific performance of an option to purchase. Thus, where property was leased for ten years with an option to purchase for a sum named and the Civil War coming on the tenant having the option exercised it and tendered the purchase price in legal tender notes of the United States which were at that time greatly depreciated as compared with standard coin, the court held that it would decree specific performance only upon payment of coin or its equivalent. For it is a general rule in equity that specific performance will be decreed in such cases only where it will work no hardship or injustice. If this will result, the court will either leave the parties to their remedies at law or grant specific performance on such conditions as are just and fair.<sup>22</sup> So, where during the term the city causes the street upon which the property abuts to be paved at the cost of the abutting owner

tion must be clear, specific and certain. Specific performance was refused because the lease stated no price and did not provide in what manner the price was to be ascertained. The language was: "Should said party of the first part conclude to sell this property, then said second party is to have the first chance to buy the same." The terms and the price are not stated so that the option cannot be enforced. *Folsom v. Harr*, 218 Ill. 369, 373, 75 N. E. Rep. 987. In *Fogg v. Price*, 145 Mass. 513, the lease provided "if the premises are for sale at any time the lessee is to have the refusal of them." And the court said: "This is simply an agreement to give the lessee the first choice to make a contract—an agreement to sell if the parties can

agree, and not otherwise." In *Hayes v. O'Brien*, 149 Ill. 403, in commenting on *Fogg v. Price*, the court said it was clear, to justify specific performance at the suit of the lessee, a term would have to be added which was not in the contract. In *Hayes v. O'Brien*, 149 Ill. 403, a provision that the lessor may sell at any time, but that he could not do so unless he should first give the lessee an opportunity to purchase at the same price any other person might have offered was enforced.

<sup>20</sup> *King v. Raab*, 123 Iowa, 632, 634, 99 N. W. Rep. 306; *Falls v. Carpenter*, 1 Dev. & Bat. (N. C.) 237, 28 Am. Dec. 613.

<sup>21</sup> *Willard v. Tayloe*, 8 Wall. (U. S.) 557, 19 L. ed. 501.

<sup>22</sup> *Willard v. Tayloe*, 8 Wall. (U. S.) 557, 19 L. ed. 501.

and this charge is paid in part by the lessor, a decree requiring the lessee to reimburse the lessor and to pay or assume the balance as a condition precedent to specific performance is proper.<sup>22a</sup>

§ 587. The option to purchase in the tenant if not otherwise disposed of or at price offered by any other person. The provision that a lessee shall have the "preference right to purchase" the demised land at any *bona fide* offer made and acceptable to the lessor by any responsible person is a valid option being sufficiently certain as to its terms.<sup>22b</sup> The lessor must, however, give the lessee timely notice of an offer made to him with the particulars of it so that the lessee may elect whether or not to exercise his option. The lessee must also have a reasonable time to make up his mind and to make any necessary preparations to carry out the option according to its terms. What is a reasonable time for the purposes of the lessee is a question of fact depending on the circumstances of each case. If the lessor in fraud of the rights of the lessee, sells the house without notice of the sale to the lessee, the latter will be given equitable relief against the purchaser with notice of his option. A provision in a lease that a lessee shall have a renewal at the expiration of the term upon the same terms and conditions unless the lessor should dispose of the premises during the term with a privilege in the lessee to purchase any time within the term permits the lessor to dispose of the property in any way he may see fit provided he first gives the lessee notice. A conveyance by the lessor to his son by way of advancement is sufficient, and the motive or purpose of the lessor cannot be inquired into. He may dispose of the premises for the actual purpose of avoiding a renewal or a purchase by the lessee. But he must before he desposes of the property, give his lessee notice and a reasonable opportunity to buy it. He should notify the lessee of his intention to dispose of the property a reasonable period before he sells it and if the lessee after notice expressly refuses or unreasonably delays to purchase, the lessor may then dispose of the land to any other person.<sup>23</sup> A clause in a lease that the lessor must give the lessee notice of his intention to sell the prem-

<sup>22a</sup> King v. Raab, 123 Iowa, 632, 637. Cattle Co., 72 C. C. A. 436, 141 Fed. Rep. 282.

<sup>22b</sup> Slaughter v. Mallet Land &

<sup>23</sup> Elston v. Schilling, 42 N. Y. 79, 82.

ises with a privilege in the lessee of purchasing at the price offered is not a restrictive covenant the breach of which entitles the lessee to damages. The lessor may independently of such clause sell his reversion and the only effect of the clause was to terminate his relations with the tenant who by the sale would become the tenant of the grantee.<sup>24</sup> A provision that in case the landlord shall "find a purchaser" for the premises the tenant shall have an option to purchase them at a price named and if on receiving notice that the landlord has found a purchaser the tenant shall refuse to buy then he must move means that the landlord finds a purchaser as soon as in good faith he became willing to sell the premises to some person who is willing and able to buy. The landlord need not actually convey the premises to such other person. Nor need a contract in writing be signed by the landlord or the prospective purchaser. Having found a purchaser and notified the lessee of that fact, the lessor cannot thereafter by withdrawing from his bargain defeat the right of his lessee to purchase. Nor would the fact that purchaser withdraws after the knowledge of the purchase has been made known to the lessee and acted on by him prejudice the lessee's rights.<sup>25</sup>

**§ 588. The time within which the option must be exercised.** This is usually expressly provided in the covenant creating the option. In most cases it is expressly provided that the lessee must accept the offer of the lessor to sell during the term or at its expiration. A lessee who has an option to purchase only during the term will forfeit all rights if he does not exercise his option during the term.<sup>26</sup> Where it is expressly stipulated in the lease that the option to purchase must be exercised within a particular time is usually regarded as of the essence of the contract. The offer to sell is binding on the lessor only during the period within which the option may be exercised. The assent or acceptance of the offer by the exercise of the option, whether by the payment of the purchase price, the giving of notice by

<sup>24</sup> Callaghan v. Hawkes, 121 Mass. 298, 299; Blanchard v. Ames, 60 N. H. 404.

<sup>25</sup> McCormick v. Stephany, 61 N. J. Eq. 208, 215.

<sup>26</sup> Kruegel v. Berry, 75 Tex. 230, 9 S. W. Rep. 863. A tender by the

tenant during the term is enough when the landlord refuses or is unable to convey. The tenant may thereafter continue in possession until the landlord is ready to comply with his agreement.

the lessee or the performance of some other condition by him must be made within the time limited or the contract will not be consummated. Equity cannot vary the terms of the stipulation by an extension of the privilege or option. Time is a part of the contract and equity will not interfere unless upon the ground of fraud or excusable mistake. Such a case differs from a case of relief granted against a penalty inserted in the lease for the purpose of enforcing a covenant and from a case of the forfeiture of some estate or interest which has been actually acquired and from which a party may be relieved upon equitable terms.<sup>27</sup> Considering an option to purchase at the *expiration of the term*, it has been held that this means the term provided for in and by the lease. It does not mean the date when the term is brought to an end by a forfeiture.<sup>28</sup> A stipulation contained in a lease for one year which was to continue in force from year to year subject to being terminated at the end of the term above mentioned or of any term thereafter that the tenant might purchase "at the end of said term" confers upon him an option which he may exercise at the end of the first year, or at the end of any year following that while the lease lasts.<sup>29</sup> A surrender of a lease before it has expired would put an end to the option which was to be exercised during the term or at its expiration. But taking a new lease before the expiration of an old one for the purpose of correcting an error both of which contained a covenant to surrender at the expiration of the term, and the old lease was retained by the lessee, is not a surrender in law. The option survives where the new lease did not contain one which was contained in the old lease.<sup>30</sup> An agreement to sell "at any time during the existence of the lease" is a continuing obligation which may be taken advantage of at any time during the

<sup>27</sup> Steele v. Bond, 32 Minn. 14, 21, 18 N. W. Rep. 830, where a lessee had an option to purchase "at any time before the expiration of the term" for a sum "to be paid down in cash to the lessor, upon the demand of a deed prior to the expiration of the lease." Compare Rankin v. Rankin, 216 Ill. 132, 74 N. E. Rep. 763.

<sup>28</sup> Lent v. Curtis, 24 Ohio C. C. 592.

<sup>29</sup> Thomas v. Gottlieb Bauernschmidt, Straus Brewing Co., 102 Md. 417, 421, 62 Atl. Rep. 633, holding that the parties had defined the word "term" by a provision that all covenants shall remain in force from term to term.

<sup>30</sup> Lister Agricultural Chemical Works v. Selby, 68 N. J. Eq. 271, 278, 59 Atl. Rep. 247.

<sup>31</sup> Maughlin v. Perry, 35 Md. 357.

term.<sup>31</sup> So, an option to receive a deed if the lease "should at any time thereafter pay the lessor" a stated sum gives a lessee the right to purchase at any time and the existence or non-existence of the lease when the demand is made is not material.<sup>32</sup> And a covenant in a lease giving a lessee "the first privilege of buying said premises at any time he may wish to do so" at a stated price means that if the lessor desires to sell the premises he must first give the lessee the privilege of buying the same at the stated price and that if the lessee does not buy the lessor may then sell to another.<sup>33</sup> An option in the lessee to buy the land for a certain sum which is mentioned in the lease binding the lessor to sell and convey on or before the expiration of three years from the date of the lease may be exercised at any time during the period of three years and as the option is a separate and independent covenant from the lease, it cannot be defeated by the service of a notice by the lessor terminating the lease for a breach of a condition though the termination may be justified by the circumstances.<sup>34</sup> An option in a lease to sell the lessee the premises leased for a certain sum without any fixed period for its exercise by the lessee must be exercised within a reasonable time by the lessee. The lessor is bound neither to hold his offer open indefinitely, nor to keep the property in the market. Whether the lessee has or has not exercised the option within a reasonable time is a question for the court upon all the circumstances of the case. So, where the lease which contained the option was for a year only it may be considered that an exercise of the option by the lessee after the year had expired was not within a reasonable time.<sup>35</sup> Where

<sup>32</sup> *Prout v. Roby*, 15 Wall. (U.S.) 476.

<sup>33</sup> *Schroder v. Gemeinder*, 10 Nev. 355.

<sup>34</sup> *Mathews Slate Co. v. New Empire Slate Co.*, 122 Fed. Rep. 972.

<sup>35</sup> *Stone v. Harmon*, 31 Minn. 512, 515, 19 N.W. Rep. 88. Also holding that parol evidence of facts and circumstances known to the parties at the date of the execution of the lease must be received to show what was a rea-

sonable time, but not to show that the parties understood or agreed the offer was to remain open for any specified time or their understanding as to a reasonable time. Where a lease granting an option to purchase at its termination expires on a certain day, the lessee has all that day to accept the option, but loses his right to accept thereafter, by his failure or refusal to accept on the day the lease expires. *Tilton v. Sterling Coal & Coke Company*, 28 Utah,

both parties are mistaken as to the time within which an option to purchase must be exercised, neither party will be permitted to take any advantage of the other by reason of such a mistake if this action of the court in extending the time does not injure the other party.<sup>37</sup> Under circumstances of a peculiar character which are likely to work a hardship to the tenant, equity may overlook and excuse his failure to exercise his option promptly. If the forfeiture of his right to exercise his option will entail a serious loss upon him and an extension of his time will work his landlord no injury, the lessee may be relieved in equity from the consequences of his delay. Where the assignee of a lease for ten years, with the privilege of purchasing the property at a price which is stipulated, makes considerable improvements on the premises indicating an intention to purchase and the lessor dies, and the heirs are some infants, and some non-residents, and the administrator refuses to receive the purchase money and no suit is brought until twenty-one days after the expiration of the lease, no principle of equity is violated by holding that there has been no forfeiture of the option to purchase.<sup>38</sup> The right of a lessee to exercise an option to purchase the premises on or about a fixed date, is not destroyed by the fact that the premises themselves are partially destroyed by fire before the exercise of the option, and the term thus brought to an end. The option to purchase is independent of the duration of the term.<sup>39</sup> Usually if the lessee accepts the lessor's offer during the term, it is enough and he need not pay the purchase money during the term unless this is expressly required of the lease. He ought, however, to pay within a reasonable time.

173, 77 Pac. Rep. 758. Elsewhere it has been held he may make a tender of the purchase money at any time during the day following that on which the lease expires. *Herman v. Winter* (S. D.), 105 N. W. Rep. 457.

<sup>37</sup> *Keyport Brick & Tile Mfg. Co. v. Lorillard* (N. J. E.), 19 Atl. Rep. 391; *Lorillard v. Keyport Brick & Tile Mfg. Co.*, 48 N. J. Eq. 295, 301, 22 Atl. Rep. 203.

<sup>38</sup> *Page v. Hughes*, 2 B. Mon. (Ky.) 439, 445.

<sup>39</sup> *Edwards v. West*, 47 L. J. Ch. 463; 7 Ch. D. 858, 38 L. T. 481, 26 W. R. 507. Usually if the lessee accept the lessor's offer during the term it is enough and he need not pay the purchase money during the term unless this is expressly required by the lease. He ought however to pay within a reasonable time and until he shall pay his lessor will enjoy a vendees lien for the purchase money which equity will enforce.

sonable time and until he shall pay, his lessor will enjoy a vendor's lien for the purchase money which equity will enforce.<sup>40</sup>

**§ 589. The performance of conditions precedent by the lessee.** The option, being based upon a valuable consideration, is binding upon the lessor during the existence of the term. It is not, however, a contract to purchase by the lessee until it is accepted, or performed, or, if performance is prevented by the lessor, until tender of performance is made by the lessee. The option gives the lessee a privilege to purchase upon the performance by him of certain conditions which are embodied in it; while, on the other hand, it binds the lessor to sell and convey the premises upon the proper performance by the lessee of the terms and conditions named in it. The lessee must, therefore, comply with all the requirements of the option.<sup>41</sup> An offer to purchase on terms not mentioned in the option may be a rejection.<sup>42</sup> The lessee, if he would exercise his option, must duly perform all conditions precedent incumbent upon him under the terms of the lease.<sup>43</sup> A stipulation that he must give notice of his intention to buy must be strictly complied with. If he has an option to buy at the same price as is offered by another, he must, as soon as he hears of an offer to buy by another person, promptly tender the amount and demand a deed.<sup>44</sup> Where a lessee has an option to purchase at the end of the term on six months' notice in writing, and the payment of a sum of money, both the payment of the money and the giving of the notice are conditions precedent to the exercise of the right to purchase, and the money not having been paid, there is no valid exercise of the option.<sup>45</sup> He cannot exercise his option nor is he entitled

<sup>40</sup> Hartman v. McAlister, 5 N. Car. 207.

<sup>41</sup> Tilton v. Sterling Coal & Coke Company, 28 Utah, 173, 77 Pac. Rep. 758; Hill v. Allen, 185 Mass. 25, 26, 69 N. E. Rep. 333.

<sup>42</sup> A conditional acceptance by the lessee is a rejection of the option. Tilton v. Sterling Coal & Coke Company, 28 Utah, 173, 179, citing Gigger v. Nesbitt, 122 Mo. 675, 27 S. W. Rep. 385, 43 Am. St.

Rep. 596; Minneapolis & St. L. Ry. Co. v. Columbus R. Mill. Co., 119 U. S. 149, 1 Sup. Ct. 168, 30 Law Ed. 376.

<sup>43</sup> Frank v. Stratford-Handcock 13 Wyom. 37, 77 Pac. Rep. 134.

<sup>44</sup> Race v. Groves, 43 N. J. Eq. 280, 287.

<sup>45</sup> Weston v. Collins, 34 L. J. Ch. 353, 11 Jur. (N. S.) 190, 12 L. T. 4, 13 W. R. 510.

to a decree for specific performance where he does not pay his money in time.<sup>46</sup> An option in a tenant to buy at a stated sum and if the landlord decides to sell to anyone else, then the tenant to have notice of same and a refusal to purchase is an option to buy for the stated sum and not for a less sum for which the landlord may sell to another. And a tender of a less sum than the stated amount is not a compliance with the tenant's obligations and did not give him any title, legal or equitable, which would prevent his eviction where he holds over after his term has expired.<sup>47</sup> Having made a legal tender, he may recover damages for the loss of his bargain if the lessor refuses to sell. It has been held, however, in the absence of an express requirement to that effect the tenant need not pay or offer to pay the purchase money where the option is to purchase at a price stipulated in the lease.<sup>48</sup> Where the prompt payment of the rent upon the dates when it is due is made a condition precedent, is required and time is the essence of the contract and it is also provided that on default in the payment of rent, the lease shall be at an end, the tenant must pay all rent prior to the valid exercise of an option by the tenant to purchase the property. The landlord is not bound to sell him the property until he has paid the last instalment of rent. The tenant's failure to pay this is a forfeiture for which equity will grant no relief. Neither is the landlord bound to tender him a deed before he has paid all the rent.<sup>49</sup> For where the parties have

<sup>46</sup> Ranelagh v. Melton, 2 Drew & Sm. 278, 34 L. J. Ch. 227, 10 Jur. (N. S.) 1141, 11 L. T. 409, 13 W. R. 150.

<sup>47</sup> Bennet v. Farkas, 126 Ga. 228, 54 S. E. Rep. 942.

<sup>48</sup> Smith v. Gibson, 25 Neb. 511, 517, 41 N. W. Rep. 360. If the lessee exercise his option during the term, which is refused, he need not tender the purchase price, in the absence of an express requirement to that effect, before he can maintain an action for the specific performance of the option. By accepting the option or offer the lessee becomes a purchaser in pos-

session and where the lease is in writing his acceptance of an offer contained in it may be oral without violating the statute of frauds. Smith v. Gibson, 25 Neb. 511, 517, 41 N. W. Rep. 360; Kellogg v. Lavendar, 9 Neb. 418, 425. Compare Hartman v. McAlister, 5 N. Car. 207, where the lessee exercises his option but paid only a portion of the purchase money during the term, yet he had specific performance.

<sup>49</sup> Carpenter v. Thornburn, 76 Ark. 578, 581, 89 S. W. Rep. 1047; Campbell v. Babcock, 13 N. Y. Supp. 843, 26 Abb. New Cases, 35.

expressly agreed that time shall be of the essence of the contract or where the contract is expressly made to depend upon a condition precedent, a court of equity will not relieve a vendee from a forfeiture incurred by a breach of such condition precedent. So, usually the lessee whose rent is in arrears is in danger of losing his option particularly where there is a provision for forfeiture for the non-payment of rent. If he is summarily ejected for a failure to pay rent, he no longer has an option. The lessor may, however, waive the forfeiture expressly or by implication arising from his conduct.

**§ 590. The necessity for notice by the lessee to the lessor.** A provision in a lease which confers an option to purchase upon the tenant, that he shall give notice to the landlord of his intention to exercise this option makes the giving of such a notice a condition precedent to the exercise of the option by the tenant. A provision regulating the giving of a notice that the tenant means to exercise an option to purchase the leased premises must be strictly complied with by the tenant. Thus, where the lease contains a provision that notice shall be given to the lessors or to the survivor of them, it is necessary that notice be given to all the lessors and a notice in writing to one of them only of the intention to purchase does not bind the others where all are alive. Hence, the option lapses and a sale based upon notice to one only cannot be specifically enforced.<sup>50</sup> A notice required to be given to a lessor by a lessee of his intention to exercise an option is usually of the essence of the contract; and, if the lessee fails to give the required notice, or gives it too late, he cannot exercise his option. For in such a case the giving of the notice is in fact the exercise of the option.<sup>51</sup> So, the mode of giving the notice as it is provided for in the lease must be strictly followed by the lessee. The notice must be given to the persons specified in the lease as those who are to receive it. A provision that the lessee may exercise an option to purchase on the service of a notice thereof upon the lessor or his heirs, is satisfied by serving the notice of the election to purchase on an infant heir and also on his guardian. This construction is not altered by the fact that the lessor devised his real estate to trustees who refused to execute the trust, or by the fact that there

<sup>50</sup> Sutcliffe v. Wardle, 63 Law T. 329.      <sup>51</sup> Mason v. Payne, 47 Mo. 517.

would be some difficulty about the person who was to receive the purchase money. The agreement being binding on the heirs of the lessor, the court would provide for a proper mode of paying the money and the heir being an infant and a ward of the court, the court would see to it that permission should be granted for him to convey, and a referee appointed for that purpose, and also that the money should be properly invested and a proper discharge given for the purchase money by an officer of the court acting for the infant.<sup>52</sup>

**§ 591. The effect of the exercise of the option.** A stipulation in a lease that the lessee may purchase the premises for an amount fixed, with an agreement by the lessor that upon the payment of that sum to him by the lessee he will convey the property is a continuing offer to sell. The lessee's notice of his election to purchase is an acceptance and this with the offer constitutes a complete contract of sale as of the date of the lessee's notice of election.<sup>53</sup> After the lessee has exercised his option in a legal and proper manner and in conformity with its terms as set out in the lease, he is the owner in equity though not in law, subject to the payment of the purchase money by him for which his vendor has a lien. When after this he continues in the possession of the premises, his possession is that of an owner and not that of a tenant. His possession is notice to all persons dealing with the property of his rights under the contract and the vendor cannot thereafter create a lien by a mortgage which shall be paramount to the title which the lessee has thus acquired under his lease.<sup>54</sup> A lessee must

<sup>52</sup> Woods v. Hyde, 31 L. J. Ch. 295, 6 L. T. 317, 10 W. R. 339. In Mason v. Payne, 47 Mo. 517, where a lessee was required to give thirty days' notice of an intention to purchase at any time within five years, it was held that two days' notice was not enough. Also some of the defendants being minors, it was sufficient to allege readiness to pay and then to pay the money into court. The notice is of the essence of the contract. The offer to sell is a proposition without mutuality and the accept-

ance must correspond with the offer. The fact that the heirs of the vendor were infants does not dispense with the notice which is not a mere demand of a deed but an act positively required by the option to be performed by the lessee before he shall acquire any rights.

<sup>53</sup> King v. Raab, 123 Iowa, 632, 99 N. W. Rep. 306; Frank v. Stratford-Handcock, 13 Wyo. 37, 77 Pac. Rep. 134.

<sup>54</sup> Smith v. Gibson, 25 Neb. 511, 517, 41 N. W. Rep. 360; Wade v.

be prompt in the assertion of any rights he may have under an option to purchase. If he has knowledge that his lessor has sold the premises or is about to sell them to another person and he, having this knowledge, remains quiescent until the sale has been consummated and other persons as *bona fide* purchasers have acquired legal rights in the property, the lessee is estopped to assert any rights under the option which are adverse to the rights which others have acquired. If a lessee having an option to purchase, surrenders possession to another purchaser from the lessor, he has forever waived all rights he may have under the option. As soon as the lessee learns that his lessor is about to sell to another the premises which he has an option to purchase at whatever price may be offered the lessor, he must at once offer to pay as much as the other and demand a deed.<sup>55</sup> The lessee may usually exercise the option at any time during the term of the lease. Some cases hold that a mere acceptance of the offer of the lessor to sell is not enough alone to constitute the lessee a purchaser, unless he shall during the term also tender or offer to tender the purchase price and shall then and there demand a deed.<sup>56</sup> When he does so and pays or tenders arrears of rent to the date of exercising the option he ceases to be a tenant. The lease is, by his action, terminated and he is not holding over with the right in the lessor to elect whether he shall treat him as a trespasser. The tenant becomes by the exercise of the option, the payment of the rent to date and the tender of the purchase money the owner in law and in equity of the premises.<sup>57</sup> If the lessor expressly refuses to convey the tender of the purchase price and the demand for a deed are

Smith Penn. Oil Co., 45 W. Va. 380, 32 S. E. Rep. 169.

<sup>55</sup> Race v. Groves, 43 N. J. Eq. 280, 287.

<sup>56</sup> Hill v. Allen (188 Mass. 25, 26, 27, 69 N. E. Rep. 333), also holding a contention of the lessee that, as he had an option to buy at any time during the lease, he was not obliged to pay rent after he had merely told the lessor he would buy the farm without making any tender of the rent or de-

mand for a deed and that he need not pay any rent thereafter after saying he would buy and that without doing anything further he could go on and occupy the farm rent free for three years was without merit and that he was liable for rent for the time he occupied the premises.

<sup>57</sup> Walker v. Edmundson, 111 Ga. 454, 456, 36 S. E. Rep. 800, 801.

not necessary to enable the lessee to maintain an action for specific performance.<sup>58</sup>

§ 592. When the lessee's option to purchase passes to his assignee. According to the majority of the cases the option of a tenant by virtue of which he may purchase the demised premises from his landlord during the continuance of the lease at a price fixed or to be fixed passes by an assignment of the lease to the assignee.<sup>59</sup> An option in the lessee to purchase the premises, is an incident to the lease, and where the lessee dies intestate, it passes, as a part of his personal estate to his administrator. The option cannot be exercised by the administrator for his own benefit, but only for the benefit of the next of kin, and if he buys the premises, taking title personally, he will be regarded as a trustee for the next of kin at least as far as he pays for it with the money of the estate and makes a profit on it.<sup>60</sup> But it has been held that a stipulation by a lessor that in case the land should be offered for sale during his lease the lessee was to have the first offer upon terms as favorable as those offered to any other person is a personal covenant and does not run with the land so that where the lessor transfers his reversion during the term, his grantee was not bound by the option.<sup>61</sup> The rule that the option of a tenant to purchase the land passed to the assignee of the tenant may have its exceptions. In most of the cases which have sustained the rule that an option to pur-

<sup>58</sup> Butler v. Threlkeld, 117 Iowa, 116, 90 N. W. Rep. 584.

<sup>59</sup> Laffan v. Naglee, 9 Cal. 662, 7 Am. Dec. 678; Hall v. Center, 40 Cal. 63; Jackson v. Livingston, 7 Cow. (N. Y.) 285; Kerr v. Dey, 14 Pa. St. 112. A covenant by the lessee and his assigns that if he shall sell he shall give a pre-emption to the lessor and his assigns is valid and binds not only an immediate assignee of the lessee but also his assign either voluntary or by operation of law. Jackson v. Livingston, 7 Cow. (N. Y.) 285. In Lawes v. Bennett, as stated in Ripley v. Wat-erworth, 7 Ves. 436, the assignability of an option to purchase

under a lease is assumed. This was followed in Townley v. Bed-well, 14 Ves. 591, and approved in Danielson v. Davidson, 16 Ves. 253. In Kerr v. Day, 14 Pa. St. 112, where the assignee of a lessee was granted relief in an ejectment brought against him by a grantee of his lessor, the court in decid-ing that an option in the lessee to purchase passed by the assign-ment proceeded upon the grounds of equitable notice com-ing to the grantee of the lessor.

<sup>60</sup> Adams v. Kensington Vestry, In re, 54 L. J. Ch. 87, 27 Ch. D. 394, 51 L. T. 382, 32 W. R. 883.

<sup>61</sup> Elder v. Robinson, 19 Pa. St. 364.

chase passes to the assignee the option in the lessee gave him the right to purchase for cash, or else no mode of payment was specified and in the latter case the lessor would by implication have the right to demand cash in case he did not desire to give credit. In this class of cases the privilege is not personal to the lessee and will pass to the assignee or mortgagee of the lessee. But where the lease confers upon a lessee an option to purchase the premises on credit, wholly or in part, a different rule ought, it would seem in justice to the lessor, to be applicable. For, a landlord who gives his tenant who is well known to him an option to purchase upon terms of credit may not be willing to give credit to another person who, when he makes the lease, is absolutely unknown to him and who, when he executes the option, may be insolvent and irresponsible. To permit the lessee to assign his option to purchase on credit, may also, it may be observed, enable him to procure a title ultimately in himself with a minimum of cost by the use of an insolvent assignee who, taking the title on credit without paying the purchase price to the lessor, may subsequently convey it to the lessee. It would seem only just and fair to the lessor in such cases, that the general rule of the law of contracts that rights arising out of a contractual relation cannot be transferred if they involve a relation of personal confidence between the parties so that it may be clearly inferred that the party who conferred the rights intended they should be exercised only by him upon whom they were conferred, must apply to such cases. Accordingly, it has been held that a mortgage of a leasehold estate by a lessee who, under the lease, has an option to purchase the leased building, partly on credit at a price therein named, at any time during the term, does not convey such option to the mortgagee who consequently has no interest therein which he can convey to a third person.<sup>62</sup> This is the consequence of the fact that accord-

<sup>62</sup> Menger v. Ward, 87 Tex. 622, 30 S. W. Rep. 853, reversing 28 S. W. Rep. 821. In Menger v. Ward, 87 Tex. 622, 627, 30 S. W. Rep. 853, the rule that a mortgage of a leasehold does not confer upon the mortgagee an option to purchase the premises partly on credit at a price named was based

upon the fact that if the leasehold was sold under foreclosure at public auction any one who might purchase it would have the right to exercise the option to purchase the reversion as a result of which the lessor who owned the reversion would be forced to contract with some one not selected by him

ing to modern principles a mortgagee of personal property has only an equitable interest in it. Thus, it has been held in England that an option to purchase the fee simple given to a lessee or his assignee cannot be exercised by the owner of the equitable interest in it.<sup>63</sup> An option in the lessee to purchase the property or to have a renewal of the lease does not by the mortgage of the lease pass to the mortgagée. The lessee does not until he shall have exercised his option, become entitled to any legal interest in the land by virtue of his option. After he has exercised his option the situation is different but up to that time he has no interest by or under the option which a court of law can recognize as a legal title. The mortgagee of the lessee cannot exercise the option until he has acquired the legal title to the term by a purchase which he must do if at all before its expiration. By the latter event all his rights are extinguished.<sup>64</sup> So, too, a purchaser of the lease from the lessee cannot compel the lessor to sell him the premises so long as the contract to purchase the lease remains executory. Nor can the purchaser of the lease recover damages from the landlord for the refusal of the landlord to sell him the property under the option, so long as his interest in the lease is only what he is entitled to under an executory contract to purchase the lease. The lessee's option to purchase inserted in the lease may be either an independent contract which will survive the lease or it may be so connected with the other terms and circumstances of the lease as to terminate with the lease. If the lease and the option to purchase are independent the lessee may, unless his actions are controlled by the language of the lease, assign the term of the lease to one person and the right or option to purchase to another. Whether or not the contract entered into by the parties conferring a right to purchase on the lessee is independent depends upon the construction of the lease in its entirety. Where the lease expressly stipulates that the right to purchase terminates with the lease, no room for construction exists. And the right to purchase is not usually regarded as independent where from the

and to give him credit without  
any confidence in his ability to  
pay

Ch. 622, 1899, 2 Ch. 261, 81 Law T.  
(N. S.) 101, 47 Weekly Rep. 662.

<sup>64</sup> Conn v. Conner, 86 Iowa, 577,  
580, 53 N. W. Rep. 320.

<sup>62</sup> Friary Holroyd & Healey's  
Breweries v. Singleton, 68 Law J.

language or even from slight circumstances a different construction can be had by the courts.<sup>65</sup>

**§ 593. The passing of the right of an election from the lessor to the lessee.** Where by the lease the lessor has a right to choose which of two or more things he shall do upon its termination and the lessee has an interest in and a right to have the election made by the lessor, the lessee may on the failure of the lessor to elect which he shall do, make an election himself. On the failure of the lessor to elect, the right to elect passes to the lessee for in such case he has a right that the lessor should make an election. So, where by a lease the lessor was bound on the expiration of the lease either to give a new lease, to purchase fixtures of the lessee, or to permit the lessee to purchase the premises, and he fails to do either, the lessee may elect and having elected to purchase, he may compel specific performance.<sup>66</sup>

**§ 594. Disposition of the insurance money when premises are destroyed during the term.** In a recent case in the state of Connecticut,<sup>67</sup> the question as to the disposition of insurance money paid by reason of the destruction of the premises by fire during the term as between a lessor and a lessee who had an option to purchase, was discussed. The circumstances of the case were peculiar and exceptional and the court strongly inti-

<sup>65</sup> Ober v. Brooks, 38 N. E. Rep. 429, 162 Mass. 102. In a case where a lessor had covenanted to convey to the lessees for a certain sum, an assignee of a portion of the lessee's interest in the lease may compel a specific performance in equity. He may in his own name sue for performance if the other parties in interest refuse to sue. Van Horne v. Crain, 1 Paige (N. Y.) 455. On the other hand a covenant that a lessor would pay for improvements, or if he did not, that the lessees might purchase the premises at an appraised value, was held not to be divisible but that all the sublessees must join to secure the benefit of the covenant and that

the original lessee, who had assigned the lease must be made a party to the action. Ostrander v. Livingston, 3 Barb. Ch. (N. Y.) 416.

<sup>66</sup> Coles v. Peck, 96 Ind. 333, 337, 49 Am. Rep. 161, citing 9 Viners Abr. 362; Story on Contracts, § 816. See Bamman v. Binzen, 65 Hun, 39, 19 N. Y. Supp. 627, 629, which held that an election to renew or sell was wholly in the lessor and that on the failure of the lessor to elect the lessee could not renew, where he had not offered to renew or purchase during the term.

<sup>67</sup> Williams v. Lilley, 67 Conn. 50, 34 Atl. Rep. 765, 37 L. R. A. 150, decided and reported in 1895.

mated in its opinion that the decision should not be regarded as laying down any general rule of law but should be confined in its application to the particular case. The circumstances were as follows: The lessee had rented a portion of a building with an option to purchase the entire building during or at the end of the term for a fixed sum from which the rent paid by him was deducted. The lessee was to pay all taxes and insurances, heat the building and bear all expenses of maintenance so that the lessor would receive the rental paid as net profits. On the other hand, the lessor agreed if the rents received by the lessee did not equal the amount paid by him the lessor would make good the difference. On a portion of the building being destroyed by fire, the lessor received the insurance money and spent a part of it in repairs on the building. The lessee subsequently elected to buy the property and claimed the unexpended insurance money should be credited to him as a part of the cash he was obligated to pay and the court held that on the peculiar provisions of the lease it was the intention of the parties to treat the so-called lease as a present contract of sale in the event of the lessee exercising his option and that whenever he did so his election related back to the date of the execution of the instrument and that as it did not appear that the building had been fully restored by the money which had been spent the lessee was entitled to have the unexpended insurance money applied to the cash portion of the purchase price. It is advisable that a tenant having an option should effect insurance upon the premises in his own name. He may then, in case of fire, exercise the option and claim the insurance money as his own. A tenant for one year who has an option to purchase the demised premises at the end of the year which is extended from time to time, is entitled to the proceeds of an insurance policy where he has the premises insured, the policy being made payable to the tenant as his interest may appear where the property is destroyed by fire during the second year.<sup>68</sup>

**§ 595. Equitable relief in the cases of options to purchase—Remedy of the tenant by specific performance.** An option to purchase will be specifically enforced in equity.<sup>69</sup> The general

<sup>68</sup> People's Street Ry. Co. v. Spencer, 156 Pa. St. 85, 27 Atl. Rep. 113. <sup>69</sup> King v. Raab, 123 Iowa, 632, 99 N. W. Rep. 306.

rules and principles of equity which are considered and applied in the case of an application for equitable relief in the shape of specific performance are, as a rule, applicable to a demand for the specific performance of an option to purchase. Ordinarily the advantages or disadvantages arising from the bargain between the lessor and lessee, whether from unforeseen contingencies, or from causes which were, or may have been known to both parties, or to either at the date of the lease, will not be considered. That the premises have increased in value beyond the price named in the option cannot be urged by the lessor as a defense in an action to secure its specific performance. The question and the sole question is, was the agreement giving the option, at the date of its execution, fair and reasonable? If this were so, it will be conclusively presumed that the parties took upon themselves the risk of subsequent fluctuations in value.<sup>70</sup> For fluctuations in the value of real property, particularly where it consists of land with buildings erected thereon and which are used for business or residential purposes, may reasonably be expected to take place and the parties will be presumed to have contracted with that expectation in mind. Indeed, the fact that a lessee accepts an option to buy taken alone indicates perhaps that he expects when he makes the lease that the value of the property will be enhanced during his term. The rule that the happening of unforeseen contingencies will not invalidate the option which will ordinarily be relied on is somewhat limited in its scope and not without exception where the circumstances require an exception to be made. Equity will endeavor to the utmost to do justice and right according to the circumstances of each case and ordinarily specific relief will be granted only in a case where it is clearly apparent from a comprehensive view of the proof that justice will be secured thereby to all parties. And, on the other hand, if it appears that the specific performance of an option to buy in the lessee will work grievous hardship or injustice to the lessor, it may be refused or if not refused, it may be granted with some form of compensation to the lessor. It is not enough in equity to show that the lessee has legal rights, that his option is technically lawful and on

<sup>70</sup> King v. Raab, 123 Iowa, 632, 99 N. W. Rep. 306; Willard v. Tayloe, 8 Wall. (U. S.) 557, 19 Law Ed. 501.

good consideration and that he has exercised it legally. It must appear to the court of equity that no injustice or hardship would result to the lessor from a decree of specific performance, for, if such is the case, equity will refuse to direct specific performance and leave the lessee to his remedy at law for damages.<sup>71</sup> Thus, where during the term of the lease, the city caused the street upon which the demised premises abutted to be paved at a considerable expense to the lessor, the court, in decreeing the specific performance of an option to purchase on the application of the lessee, directed that he should compensate the lessor for his compulsory outlay for paving. The premises being located on a side street in a village where there had been no paving down to the date of the lease, it was conclusively presumed that the parties could not have anticipated the action of the city and that therefore, this was a contingency which they could not have then had in mind.<sup>72</sup> Equity will protect a lessee having an option to purchase against a fraudulent attempt by his lessor to deprive him of his rights under it. The fact that a clause giving the lessee a preference right to purchase the demised premises in case of a sale is not legally enforceable, will not affect his right in equity to defeat or set aside a fictitious deed by his lessor, the object of which was to defeat his rights. He may show the fraud attempted to be practiced upon him. If he has a preference as a purchaser, in case of a sale conferred upon him by the terms of a lease, his rights can only be destroyed by a *bona fide* sale; he cannot be ousted under a clause permitting the lessor to terminate the lease by a fraudulent sale to another person, because he refused to pay the lessor a price which was falsely stated to have been offered by another person. Such a misrepresentation by the lessor with an intention to deprive the lessee of his preference to purchase, and at the same time to deprive him of his right to possession, will not be tolerated in a court of equity. The sale can only be made in

<sup>71</sup> King v. Raab, 123 Iowa, 632, 97 N. W. Rep. 306, as to the general principle see the following cases: Godwin v. Collins, 3 Del. Ch. 189; Seymour v. Delancy, 6 Johns. Ch. (N. Y.) 223; Freetley v. Barnhart, 51 Pa. St. 281, Huguenin 21 S. Car. 403, 53 Am.

Rep. 688; King v. Hamilton, 29 U. S. 311, 7 Law ed. 869; Mansfield v. Sherman (Me.), 17 Atl. Rep. 300; Underwood v. Hitchcock, 1 Ves. Sr. 279; Joynes v. Statham, 3 Atk. 388.

<sup>72</sup> King v. Raab, 123 Iowa, 632, 97 N. W. Rep. 306.

good faith, and after the lessee has had a fair opportunity without any deceit practiced upon him to enter into competition for the purchase of the premises as against any other party who has made an offer to the landlord.<sup>73</sup> The equitable doctrine of notice may be invoked by a lessee with an option to purchase to protect his rights. Under the general rule that a purchaser from the lessor takes subject to the rights of a tenant in possession, it has been held that a purchaser from the lessor of land which has been leased with an option in the lessee to purchase it during the term, will by implication, be presumed to have knowledge of the equitable rights of the lessee where the lessee was actually in possession of the land, either in person or by his assignee.<sup>74</sup> The fact of possession by a tenant in equity is regarded as sufficient to put the purchaser of the premises upon inquiry and if he fails to make a proper inquiry, he will be presumed to have actual notice of every fact he would have ascertained if he had instituted such an inquiry. It follows from this that a lessee or his assignee if actually in the possession of the premises may secure the specific performance of an option to purchase contained in the lease as against a person who buys from the lessor during the term.<sup>75</sup>

**§ 597. Damages for the breach of a covenant to permit the lessee to purchase the premises.** A lessee who is entitled under a covenant of his lease to purchase the premises upon terms and

<sup>73</sup> Ogle v. Hubbel, 1 Cal. App. 375, 82 Pac. Rep. 217.

<sup>74</sup> Kerr v. Day, 14 Pa. St. 112.

<sup>75</sup> It is very well settled under the English cases that the mere possession of a tenant for years who has an option to purchase is notice of his option or of his equitable right to have it enforced to a purchaser from the lessor. The latter is in duty bound to inquire and to inform himself of the contents of the lease under which the tenant is in possession and of all interests and estates owned or claimed by the tenant. The purchaser must inquire on what terms the tenant holds possession. Daniels v. Davidson, 16 Ves. 253.

Kerr v. Day, 14 Pa. St. 112, 117; In this case Lord Eldon said *inter alia*: "My opinion therefore, considering this as depending on notice, is, that the tenant being in possession under a lease, with an agreement in his pockets to become the purchaser, those circumstances altogether give him an equity, repelling the claim of a subsequent purchaser who made no inquiry as to the character of his possession." See to the same effect on the liability of a purchaser upon a tenant's option to buy on the part of his vendor, Taylor v. Stibbet, 2 Ves. 439; Crofton v. Ormsby, 2 Sch. & Lef. 583.

at a price specified in the lease may recover damages in an action at law against his lessor for a refusal to convey. The measure of damages is the same as that in a case where a vendor fails or refuses to convey to the vendee. If the lessor's refusal is caused by lack of a good title and through no fault on his part, and there is no proof that he knew that his title was bad the lessee can recover only nominal damages. If the refusal to convey is voluntary, the lessee can recover for the loss of his bargain the difference between the market price at the time he was entitled to the conveyance and the price which he has agreed to pay for the property. The same rule would apply where the lessor, when he gave an option to the lessee to purchase, knew that he had no title and by conduct or language gave the lessee to understand that he had a good title. In any event the lessee may recover any expense he has been put to in searching the title of the property.<sup>76</sup> And where the lessor, having a good title, refuses to convey, the lessee may recover the fair market value of any improvements he has made on the property by reason of his having relied upon the promises of the lessor.

<sup>76</sup> Congregation of the Sons of Abraham v. Gerbert (N. J. L.), 31 Atl. Rep. 313.

## CHAPTER XXV.

### THE TAXES AND INSURANCE.

- § 598. **The liability of the lessor for taxes.**
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  - 622. When the covenant to insure runs with the land.
  - 623. The measure of the damages for a failure to insure.

§ 598. **The liability of the lessor for taxes.** The lessor is by implication bound to pay all taxes upon the demised premises in the absence of any covenant in the lease that they shall be paid by the lessee.<sup>1</sup> Where a tenant to prevent himself from

<sup>1</sup> *Waggener v. McLaughlin*, 33 Ark. 195; *Connell v. Female Orphan Asylum*, 18 La. Ann. 513; *Leach v. Goode*, 19 Mo. 501, 503; *Biddle v. Blackburn*, 5 Pa. Law J. 419; *Caldwell v. Moore*, 11 Pa.

being evicted from land which has been forfeited to the state and sold by reason of the failure of the lessor to pay taxes, pays the amount due, he may recover them from his lessor and, it has been held, he has also a lien upon the land to protect him.<sup>2</sup> If, however, the tenant, by the erection of buildings or other improvements which by the terms of the lease or by law are to become or are to continue to be his property at the expiration of the lease so that he may remove them or be compensated for them by the landlord, enhances the taxes, he and not the landlord is bound to pay the taxes on the improvements. He must pay such proportion of the taxes as the assessed value of the improvements bears to the total assessed value of the premises.<sup>3</sup> Hence the lessor is not liable to the tax collector for taxes assessed upon the personal property of the tenant where its value is included under an assessment of the entire property under the name of the lessor for the reason that before the lessor shall be-

St. 58, 61; Mattson v. Oliver, 2 Leg. Op. (Pa.) 48; East Tennessee V. & G. Ry. Co. v. Morristown (Tex.), 35 S. W. Rep. 771; Hart v. Hart, 117 Wis. 639, 94 N. W. Rep. 890; *contra* Hughes v. Young, 5 G. & J. (Md.) 67, where the lease was for ninety-nine years with renewals forever and the court in holding the lessee liable for taxes evidently proceeded on the theory that this was a sale of the property.

<sup>2</sup> Waggener v. McLaughlin, 33 Ark. 195; Caldwell v. Moore, 11 Pa. St. 58, 61. A tenant whose personal property found on the premises is sold to satisfy taxes which the lessor is bound to pay though he may have a lien, acquires thereby no priority over the lien of a mortgage which was an incumbrance on the premises where the taxes was assessed, nor can he recover their amount from the mortgagee. Gormley's App., 27 Pa. St. 49, 53.

<sup>3</sup> Leache v. Goode, 19 Mo. 501,

503; Joslyn v. Spellman, 9 Ohio Dec. 258, 12 Wkly. Law Bul. 7. Where premises used by a firm are leased from one partner who has a life estate therein, taxes and insurance are not partnership expenses in the absence of an express agreement but are chargeable to the lessor. Hart v. Hart, 117 Wis. 639, 94 N. W. Rep. 890. The different situations of a tenant for years and a life tenant are pointed out in this case. A tenant for years, says the court, is never liable for taxes, insurance or interest or incumbrances unless by express agreement. Shepardson v. Elmore, 19 Wis. 424. And if he is compelled to pay these charges either by law or to protect his leasehold from sale, he may deduct the amount from the rent or recover it from the landlord in an action. The life tenant must always, in the absence of a contrary agreement, keep down all charges necessary to preserve the property for the remainderman.

come liable his estate in the premises must first be assessed against him as the owner.<sup>4</sup> Inasmuch as it is the duty of the tenant to list his interest under the lease, it is not material whether the improvements erected by him and any other estate or interest he may have in the lease are real or personal property. In most of the states under existing statutes the interest of the tenant in a lease which gave him the right on its expiration to remove his fixtures would be real property and it would be listed and assessed as such for taxation.<sup>5</sup>

**§ 599. The taxation increased by the tenant's improvements.** A covenant by the landlord to pay the land taxes has been held in England, where the tenant generally pays the taxes, to mean only such taxes as were payable at the date of the lease. A tenant, therefore, will be bound to pay any increase in the taxes which arises during the term from his building on, or otherwise improving the estate.<sup>6</sup> This has been held to be the rule in England, even where the landlord agrees to pay all taxes charged or to be charged, and the tenant covenanted not to make improvements without the consent of the landlord, which was given.<sup>7</sup> In Massachusetts a covenant by the lessor to "save the lessee harm-

<sup>4</sup> State ex rel. Ziegenhain v. Mission Free School, 162 Mo. 332, 62 S. W. Rep. 998; State, etc. v. Thompson, 149 Mo. 441, 457, 50 S. W. Rep. 879.

<sup>5</sup> Where land has been forfeited for the non-payment of taxes by the neglect of the owner, his tenant may terminate the tenancy by surrendering the possession, or he may protect himself from eviction by advancing the taxes and holding a lien for re-embursement. If the lands are sold at a public sale during the tenancy without the connivance of the tenant, he may purchase and set up his title against the landlord. The tenant, however, cannot use the possession which he holds as a tenant as a basis to acquire title and thereon found a claim hostile to his landlord. Equity will regard him and all persons holding under him, ex-

cept purchasers without notice, as constructive trustees for the benefit of the landlord, and will not permit him to take interest on such purchase but will allow him only the actual amount of money he has paid to get the title. No per centum beyond the legal rate established by statute should be allowed him and no penalty or costs upon subsequent taxes paid by him. Waggener v. McLaughlin, 33 Ark. 194.

<sup>6</sup> Yaw v. Leman, 1 Wils. 2, 2 Stra. 1191; Whitfield v. Brandwood, 2 Stark. N. P. C. 440.

<sup>7</sup> Watson v. Home, 7 B. & C. 285, 1 M. & R. 191, followed in Smith v. Humble, 15 C. B. 321, 3 C. L. R. 225, in which case the tax and sewer rates were agreed to be paid by the landlord and were very greatly increased by the tenant's improvements.

less from all taxes, assessments, and betterments, levied upon said premises until the termination of this lease," was held not to include the increase in taxation which arises from the making of large improvements by the tenant. The question turned upon the meaning of the words "said premises" and it appeared that the parties contemplated that the lessee might erect buildings and the lease provided that if he did so they were to remain his property and be removable by him. The court construed the words "said premises" as meaning the land only and held that the covenant meant that the landlord was to pay only such taxes as were assessed upon the valuation of the land exclusive of any building which might be put upon it. As between the parties to the lease the lessor was not bound to pay the increase of the taxes due to the valuation of the building, and he, having been compelled to pay the whole amount of the tax levied on both land and building and the lessee having refused to contribute, he might maintain an action at law against the lessee for money paid to his use.<sup>8</sup>

**§ 600. The landlord's liability for water rates.** In England the water rates, unless a contrary rule is provided by statute

<sup>8</sup> *Phinney v. Foster*, 189 Mass. 182, 75 N. E. Rep. 103. In this case the landlord was bound to pay the taxes to save his land from sale. The buildings were not taxed separately. The tenant was in no way liable personally for the taxes. The tax was a lien on the real estate which included buildings erected by the tenant. The landlord could not apportion the tax and release his own property, *i. e.*, the land by paying off the share of the tax which was a lien upon that. He must pay all or allow the property, buildings and lands to be sold. The general rule applies to such a case though the tenant is not personally liable to pay the taxes. For the taxes are a lien upon his buildings so far as they form a portion of the premises. For it is a familiar principle of law that

while one cannot make himself the creditor of another by voluntarily paying the debt of the latter without his request, still where one to save his property from being sold on legal process is compelled to pay money which another is under a legal obligation to pay and which, as between the two the latter should pay then in law the payment is made at the request of the latter and the former may recover from him. It is true that in the case cited there was no legal personal liability on the part of the lessee to pay the tax and the debt was only a lien on his property, but this creates no distinction. *Taylor v. Zamira*, 6 *Taunt.* 524. The principle is the same whether the debt be personal or a lien, the law implies a request to pay by the person benefitted by the payment.

are always payable by the tenant in the absence of an express agreement in the lease to the contrary for he has the use and enjoyment of the water supplied.<sup>9</sup> By statute an exception is made in the case of certain dwelling houses of low rental and the tenants of such houses may, after paying the water rates, deduct the amount of the same from the rent which may be due the landlord.<sup>10</sup> In England whether a landlord shall pay water rates always depends upon the exact language of the lease. Unless he has expressly or by very necessary implication agreed to do so the tenant will have to pay them. Under a covenant by a lessor to pay taxes, assessments and "*water rates, now and hereafter to be imposed or assessed upon the premises,*" the lessor is not compelled to pay for water, the charge for which is a personal charge against the lessee and which is not imposed upon the premises. The lessor would doubtless have to pay any water rate which was a charge imposed and which became a lien upon the premises, but where the statute simply gives the party furnishing the water a personal action against the person to whom he furnishes it with a privilege to cut off the supply, if the charge is not paid, the lessor under the above covenant need not pay it.<sup>11</sup> The obligation of a lessor who has covenanted to pay all rates "*in respect to,*" or "*as regards the premises,*" is broader. A covenant in England by the landlord to pay all rates and taxes "*in respect to the premises*" binds him to pay the water rates where a house is occupied in separate apartments,<sup>12</sup> and the water rate is assessed against the whole premises in a gross sum. In the United States where the water tax is assessed against the property and not against the person it is the general rule where the lease is silent as to who shall pay the water rent that it is usually paid by the owner of the property.<sup>13</sup> In fairness to the landlord this liability ought to be confined to the usual and or-

<sup>9</sup> 2 Woodfall Landl. & T. 582.

Lim. 95 L. T. 139, 70 J. P. 462, following Direct Spanish Telegraph Co. v. Shepherd, 53 L. J. Q. 420, 13 Q. B. D. 202, discussing Badcock v. Hunt, 58 L. J. Q. B. 134, 22 Q. B. D. 145.

<sup>10</sup> The English rule was followed in McCarthy v. Humphrey, 105 Iowa, 545, 75 N. W. Rep. 314.

<sup>11</sup> Floyd v. Lyons, 66 L. J. Ch. 350 (1897), 1 Ch. 633, 76 L. T. 251, 45 W. R. 435. See also Badcock v. Hunt, 60 L. T. 314, 22 Q. B. Div. 145.

<sup>12</sup> Bourn v. Salmon & Gluckstein,

<sup>13</sup> Jamesin v. Thomen, 24 Wkly. Law Bul. (Ohio) 334; Williams v. Kent, 67 Md. 350, 355, 10 Atl. Rep. 228; Moffat v. Henderson, 50

dinary water rates which are assessed against the property at the time of the lease or to such increase in water rates as may subsequently during the existence of the lease result from building or improving the premises by the landlord himself and from which he derives some direct advantage either in an increase of the rent or of the value of the property. In the absence of an agreement to that effect the landlord is not liable to pay to the tenant the water rates incurred by reason of an unusual and extraordinary use of water by the tenant solely for his own benefit, as would be the case where the tenant puts an hydraulic elevator in the building solely for his own use and accommodation<sup>14</sup> which requires large quantities of water for its proper operation, or where the tenant operates a steam engine in the building for heating or other purposes, or carries on the business of a dye house, saloon, brewery, livery stable or other business requiring much water. Where, under such circumstances as is customary the municipal authorities compel the water rates to be ascertained by a meter as contrasted with the ordinary mode of assessment there can be no doubt that the tenant would be liable to the landlord for the increase in the amount paid for water. Where however a lessee expressly agrees that he will pay the regular annual water rate an agreement by him to pay extra rates will not be implied.<sup>15</sup> If the lessee agrees to pay the water

N. Y. Super. Ct. R. 211, 217; Henderson v. Arbuckle, 54 N. Y. Super. Ct. R. 141, 145.

<sup>14</sup> Williams v. Kent, 67 Md. 350, 355, 10 Atl. Rep. 228.

<sup>15</sup> But where a statute made a charge for the extra consumption of water over and above the regular building rate, a lien upon the land and at the time of the execution of the lease a meter was upon the premises, the lessee will not be bound to pay meter charges under a covenant by him to pay "the regular annual rent or charge

\* \* \* for Croton water."

The parties to the lease of the premises which were occupied by the lessee as a livery stable knew or will be presumed to have

known that an extra water rate or charge might become a lien upon the land. If, knowing this, the lessor agreed that the lessee was to pay only the regular rate he cannot afterwards be heard to say that the lessee must pay the extra assessment. The court cannot make a new contract for the parties and the lessee, having agreed to pay a specific part of the water rate, the implication is he was not to pay the other part. The liability of the lessee can be based only upon the theory that the water rate was paid by the lessor upon the special instance and request of the lessee. Before such a request will be implied it must appear that the lessee was bound

rates upon the demised premises and the lease contains a clause of forfeiture if the lessee shall fail to perform any of the stipulations of the lease, the failure of the lessee to pay the water bills when due operates as a forfeiture of the lease.<sup>16</sup> But where there are several tenants using water measured by the same meter, the lessor cannot enter and terminate the lease on account of a lessee failing to pay his share of the water rate until he has attempted to apportion the bill for the whole building among the several tenants.<sup>17</sup> A lessee of a portion of a building who agrees

to pay in the first instance and that the property of the lessor might be taken upon the lessee's default. But on going back to the original lease we find that under it the lessee had no liability whatever and hence no promise from him can be implied. An agreement by the tenant that he will pay "all rent or charges which are or may be assessed or imposed upon the said premises for Croton-water on or before" a date specified binds him to pay water rents which are a lien at the commencement of the term, if assessed prior to the date specified. *Henderson v. Arbuckle*, 54 N. Y. Super. Ct. Rep. 141, 145.

<sup>16</sup> *Hand v. Suravitz*, 148 St. 202, 207, 23 Atl. Rep. 1117, 30 W. N. C. 115, reversing 10 Pa. Co. Ct. Rep. 302.

<sup>17</sup> *Harford v. Taylor*, 181 Mass. 266, 270, 63 N. E. Rep. 902. A tenant who, when he leases a front building agrees to pay the water "rent assessed on said premises" cannot be charged with the water consumed in a rear building not demised to him on the same lot. *Steinhardt v. Burt*, 27 Misc. Rep. 782, 57 N. Y. Supp. 751. A tenant of a portion of a building, it has been held, cannot be required by his landlord to pay part of a water tax assessed in

gross against the whole block, unless it is ascertained how much of the tax is assessed against the particular premises occupied by him, though, he has stipulated to pay all water rents taxed or charged on the premises during the term. In the same lease, the lessor was to pay water rent and the costs of repairs or pipes ordered by the Board of Public Works, and the tenant is not responsible for the tax assessed against the entire building. He is liable only for such rent as is assessed as a public charge and which would be a lien on the particular property which he has leased. *Kingsbury v. Powers*, 131 Ill. 132, 22 N. E. Rep. 479. The tenant who has agreed to pay for water during the term, cannot sue in his own name for money which the landlord has paid under protest for water rates illegally extorted and past due when the tenant went in possession. *Randolph v. Bar Harbor Water Company*, 87 Me. 126, 132, 32 Atl. Rep. 790. Where the landlord paid illegal water rates during the term on a threat by the private water company that the water would be turned off, he may sue for the return of the money but not the tenant for no consideration moved from the tenant at all.

to pay water rates assessed by meter, is liable for his portion of the amount used in the building though the authorities rendered a bill for the entire amount consumed in the building measured by a meter through which all the water used in the building passed.<sup>18</sup>

§ 601. **The construction of a covenant to pay taxes.** A covenant by the tenant that he will pay all increase in taxes and assessments over the tax as assessed at the date of the lease and increase in expenses and insurance created by improvements which the tenant had a right to make, are separate covenants and binds the tenant to pay all increases in taxes irrespective of the fact that they might not result from improvements made by the tenant.<sup>19</sup> An agreement by a tenant to pay any increase in taxes which results from his building upon the premises, binds him to pay all increase in taxes occurring after the erection of the building unless he can show that the increase arose from another cause. It will be presumed that any increase of taxation after the building is complete, is due to the enhanced valuation caused thereby.<sup>20</sup> A covenant that a lessee shall pay all assessments and taxes which are lawfully levied on the property, franchises or stock of the corporation which owns and is the lessor of the property does not bind the lessee to pay a specific tax levied on the gross receipts of the lessor by statute by way of a license fee for the right to continue and to act as a corporation. For if this so-called tax is a license to be paid for the enjoyment and exercise of a corporate franchise it follows logically that it cannot be a tax on the property or franchise of the corporation within the meaning of the language of the lease. It is assessed as a license without regard to the value of the franchise while if it were a tax on the property of the corporation or on its franchise properly so-called the value of the latter would have to be ascertained by some method of computation and according to general and uniform rules.<sup>21</sup>

The court in this case seems to assume the illegality of the act of the water company.

<sup>18</sup> Myers v. Reade, 98 N. Y. Supp. 620.

<sup>19</sup> Gridley v. Einbigler, 98 App. Div. 160, 90 N. Y. Supp. 721, 723.

<sup>20</sup> Eichner v. Cohen, 48 Misc. Rep. 541, 96 N. Y. Supp. 279.

<sup>21</sup> Jersey City Gas Light Co. v. United Gas Imp. Co., 46 Fed. Rep. 264, 267, citing Cable Co. v. Attorney General, 46 N. J. Eq. 273, 18 Atl. Rep. 733. The landlord,

**§ 602. Covenant to pay taxes not one of indemnity.** A covenant by the lessee to pay taxes is an affirmative and positive agreement to pay on his part with the lessor. It creates an original debt and obligation on the part of the lessee to the lessor and does not require that the lessor shall pay the taxes before an obligation to pay shall exist on the part of the lessee. The distinction between such a covenant to pay by which the covenantor effectually declares the sum to be paid shall be his debt and a covenant to indemnify another is important. In the first case the covenant is broken by the covenantors failure or refusal to pay the debt, *i. e.*, the tax as soon as it becomes due. In the second case the covenant is not broken until the debt has been paid by the covenantee and the covenantor has refused to indemnify the covenantee on a demand made upon him.<sup>22</sup> The lessor therefore can maintain an action against the lessee without first paying a tax assessed and recover therein the amount of such tax.<sup>23</sup> And, if it be objected that this is contrary to the rule which does not allow damages to be recovered for a possible loss it may be said on the one hand that the loss of the reversion to the lessor is very imminent and becomes more imminent so long as the tax remains unpaid; while on the other hand the lessee, who is in the enjoyment of the actual use of the land may after paying the taxes escape a judgment for damages or if one has been rendered, stay

a corporation, expressly stipulated with the lessee that it would pay all taxes upon the premises so long as from the amount assessed for taxes it was allowed by statute to deduct its capital stock in fixing the taxes which it would have to pay. The building demised representing a part of its capital stock. Subsequently, by statute a license tax was imposed upon the franchise of the lessor to be computed upon the actual value of its capital stock including the building together with its surplus and undivided profits and the corporation was also exempt from all other taxes except upon real estate. The court held that this franchise tax was not a tax upon

its real property, or upon its personal property, but a license for its right to exercise a franchise. Hence the tenant was not compelled to pay this tax as the intention of the stipulation in the lease was merely to relieve the corporation from having to pay taxes twice on its real estate and the statute taxing the franchise did not, in estimating the value thereof, include the value of the premises leased. Security Trust Co. v. Liberty Building Co., 89 N. Y. Supp. 340, 342.

<sup>22</sup> Rector, etc. Trinity Church v. Higgins, 48 N. Y. 533, 537; Gilbert v. Wiman, 1 N. Y. 550.

<sup>23</sup> Richardson v. Gordon, 188 Mass. 279, 74 N. E. Rep. 344.

its execution and procure its satisfaction in equity.<sup>24</sup> So also where a tenant is bound to pay taxes and assessments and fails to do so, during the term and they remain a lien upon the demised premises, at the end of the term the lessor may sue and recover their amount from the lessee on his covenant before he has himself paid them. His payment of the taxes which the lessee has neglected to pay is not a condition precedent to the recovery of the amount from the lessee. The lessor does not occupy the position of a surety as regards the lessee, so as to bring the case within the rule that a surety cannot maintain an action against his principal in respect to the debt for which he is surety until he has paid the debt of his principal.<sup>25</sup>

**§ 603. The time of the levy, assessment or payment.** This may be very material under the language of the lease. A covenant to pay all taxes, etc., which are levied during the term or which become a lien is a very different covenant in its effect from a covenant to pay taxes which may *become payable* during the term. At least such would be the case where the date on which taxes are levied differs from that upon which they are due and payable. Thus a lessee who covenants to pay "all taxes levied or assessed upon the premises during the term," is liable for taxes levied during the term though they may not be payable until after the term has expired.<sup>26</sup> A covenant to pay taxes laid or assessed during the term does not include taxes laid or assessed

<sup>24</sup> Sargent v. Pray, 117 Mass. 267; Bowditch v. Chickering, 139 Mass. 283, 288.

<sup>25</sup> Vorse v. DesMoines M. & M. Co., 104 Iowa, 541, 546, 73 N. W. Rep. 1064, citing Stout v. Folger, 34 Iowa, 71. The tenant's agreement to pay taxes is not to protect and save the landlord harmless, from all the consequences which might flow from the non-payment of taxes. That is not its scope, object or purpose. It is an agreement to pay taxes when due. The amount to be paid is fixed as soon as the taxes are levied and the agreement is broken as soon as they become due and are not

paid. The landlord can sue the tenant for taxes without paying them. Fontaine v. The Schulenberg & Boeckler Lumber Co., 109 Mo. 55, 60.

<sup>26</sup> Craig v. Summers, 47 Minn. 189, 191, 49 N. W. Rep. 742, 15 L. R. A. 236; Waterman v. Harkness, 2 Mo. App. 494; Clemons v. Knox, 31 Mo. App. 185, 197; Allen v. Dent, 4 Lea. (Tenn.) 676; Ogden v. Getty, 91 N. Y. Supp. 664; *contra* Valle v. Fargo, 1 Mo. App. 344. A covenant to pay all taxes *laid during the term*, binds the covenantor to pay all taxes *assessed* during the term. Elliot v. Gantt, 64 Mo. App. 248, 252.

before the term began. Such a covenant does not bind the covenantor to pay taxes which are payable during the term, but which were assessed before the term and which were a lien when the term began, and which were levied for a period prior thereto.<sup>27</sup> So a covenant to pay all taxes which may be "lawfully assessed upon the demised premises" but not specifically stating the date of the assessment means taxes assessed during the term and does not include taxes which had been already assessed before the term was created and which are a lien on the premises when the lease is executed.<sup>28</sup> So, also, an agreement to pay "taxes payable during the term" means taxes which are both assessed and which become payable during the term, and not taxes which have by reason of being assessed before the beginning of the term, become payable during the term. To construe such a covenant otherwise would be to burden the lessee with arrears of taxation which may have been standing for years.<sup>29</sup> An agreement by a tenant to pay certain taxes upon the premises when they shall become payable is released by the surrender and the acceptance of the premises before the taxes become payable. In theory the obligation of the tenant to pay taxes is merely an obligation to pay rent in another form and the general rule that surrender releases the tenant from his liability to pay future rent which is accruing but which is not yet due is applied to such cases.<sup>30</sup> A covenant to pay "all assessments for

<sup>27</sup> *McManus v. Fair Shoe & Clothing Co.*, 60 Mo. App. 216. If a local assessment is levied during the term it is not material that the paving and curbing were done before the term under a covenant to pay all taxes and assessments levied or assessed during the term. *Shepardson v. Elmore*, 19 Wis. 424, 428.

<sup>28</sup> *Cleveland v. Spencer*, 73 Fed. Rep. 559, 19 C. C. A. 559, 25 U. S. App. 626.

<sup>29</sup> *Wilkinson v. Libby*, 1 Allen (Mass.) 375, 376; *Cleveland v. Spencer*, 73 Fed. Rep. 559, 19 C. C. A. 559, 25 U. S. App. 626.

<sup>30</sup> *American Bonding Co. v. Pueblo Investment Co.*, 150 Fed.

Rep. 17, holding under the circumstances that a surety for the tenant was also released. In New York no tax or assessment can exist so as to become a lien or incumbrance upon real estate until the amount thereof is ascertained and determined. *Dowdney v. The Mayor, etc., of the City of New York*, 54 N. Y. 186. This case and *Barlow v. St. Nicholas Nat. Bank*, 63 N. Y. 399, 402, were relied on by the court in *Skidmore v. Hay*, 13 Hun (N. Y.) 441, where the covenant by the lessee was to pay all taxes, ordinary or otherwise which should be levied, assessed or grow due and payable upon or for the demised premises.

which the premises shall be liable" binds a lessee to pay an assessment subsequently imposed for opening a street although it was not authorized by any law in existence at the time the lease was executed. It will be readily presumed in a case where language of such character is employed in framing a covenant that the parties had assessments in mind which might be authorized by laws enacted in the future particularly where the lease is for a long term of years and the premises are located in a populous and growing city.<sup>31</sup>

**§ 604. The time for the payment of the taxes.** The covenant of the lessee to pay taxes ought to state specifically on what date payment shall be made by him so that the lessor may know from what particular date the lessee is in default and knowing this, he then may act to protect his own interests in the premises. Where the covenant does not specify when taxes must be paid, the lessee must pay them as soon as they become due.<sup>32</sup> He ought to pay the taxes at the earliest possible opportunity, *i. e.*, as soon as the public officer empowered under the statute to receive taxes is authorized to do so, and, if the lessee shall fail to pay the taxes within a reasonable time, the lessor may, having given him notice and requested him to comply with the terms of the lease, pay them and sue the lessee to recover the amount thus paid. When, however, the default of the lessee to pay taxes is urged as a ground for a forfeiture, a greater latitude is allowed to the tenant. Thus, where the lessor sued to forfeit the lease and to recover the premises for the lessee's failure to refund taxes paid by him which the lessee was bound to do under the lease, a tender of the taxes by the lessee to the lessor at any

The assessment rolls were open from the first Monday in January to the last day in April and were returned to the board of supervisors on the first Monday in July and the amount of tax is then set opposite the items of real and personal property. From this it follows that the amount of tax was unknown when a term began on May 1st, and could not be ascertained until the next July. The taxes therefore became due and

payable during the term and were within the operation of the covenant and must be paid by the lessee.

<sup>31</sup> Post v. Kearney, 2 N. Y. 394, 396.

<sup>32</sup> McFarlane v. Williams, 107 Ill. 33, 42; Butler v. Manny, 52 Mo. 497, 506; Trinity Church v. Higgins, 48 N. Y. 532, 536. See Fontaine v. Schulenberg, 109 Mo. 55, 18 S. W. Rep. 1147.

time before the suit is commenced, is sufficient to prevent a forfeiture.<sup>33</sup>

**§ 605. Mode of the payment of taxes by the lessee.** The lessee's covenant to pay the taxes is fulfilled by their payment by him in any manner which prevents them from becoming a burden on the lessor's property or a personal liability upon him. The lessee need not pay them in cash though this is usually the mode of payment. He may permit his leasehold interest to be sold under a warrant for the collection of the taxes, and, if the sum which is thus realized and which is paid to the authorities is sufficient to pay the taxes which are due, there is neither a breach of the condition nor any money liability to the lessor, for the result of this, so far as the lessor is concerned, is that the taxes are paid by the lessee precisely the same as if he had taken the money from his pocket and paid them. This is so whether the sale for taxes was valid or not. If it was valid the purchaser takes the balance of the term as an assignee and subject to all the provisions of the lease and he is entitled to the possession as against the lessor inasmuch as there has been no forfeiture of the lease.<sup>33</sup> A provision in a lease between railroad corporations that the lessee shall pay taxes and deduct such payments from the rent means that the taxes as fast as paid shall be by the lessee deducted from the semi-annual installments of rent which fall due next after the payment. It cannot therefore be allowed to pay taxes for a number of years and then deduct them at the end of any year or at the end of the lease.<sup>34</sup>

**§ 606. The validity of the taxes.** A covenant by a tenant to pay all taxes and assessments which may be levied means all

<sup>33</sup> Burns v. McCubbin, 3 Kan. 221, 226, 87 Am. Dec. 878. The statute of limitations begins to run against the lessor and in favor of the lessee from the day specified in the lease upon which the taxes were to be paid. Trinity Church v. Vanderbilt, 98 N. Y. 170, 175. It is the duty of the party who is to pay the taxes to ascertain when they will become due and payable. A lessor is not excused from this duty because he is a

non-resident. He will be presumed to know how often taxes are levied and when they become a lien. He may pay them at once and sue the lessee who has agreed to pay taxes levied during the term. Fontaine v. The Schuleenberg & Boeckler Lumber Co., 109 Mo. 55, 61

<sup>33</sup> Goode v. Ruehle, 23 Mich. 30.

<sup>34</sup> Lewiston & A. R. Co. v. Grand Trunk R. R. Co., 97 Me. 261, 268, 54 Atl. Rep. 750.

taxes and assessments only as are valid and which may be legally enforced against the lessor.<sup>35</sup> And where a lessee pays an assessment for local improvements by reason of a covenant in his lease binding him to pay all assessments and on an application by his landlord which was pending when payment was made the assessment was set aside, the lessee is entitled to the benefit of the decision made and may recover from the city the amount of the taxes paid by him. Though the lessee was neither the party assessed nor the party endeavoring to set aside the assessment, he was in fact the real party in interest in that proceeding which he might have instigated if he had so desired.<sup>36</sup> The assignee of a lease which obliges his assignor to pay "all and every description of legal taxes" is estopped to assert the illegality of a tax where his assignor has examined the assessment books at the meeting of the board of review at a time prior to the assignment when he could legally have objected but expressed himself as satisfied.<sup>37</sup> A tenant who is sued by his landlord for a breach of a covenant by the tenant to pay taxes may defend by showing the illegality of the tax. The fact that the tenant on being told the tax was due and asked why he did not pay it says it is all right and that he will pay the same does not estop the tenant. Both the landlord and tenant have usually equally good opportunities of ascertaining the validity of taxes and assessments. So, if a landlord pays a void assessment which is a lien on his property because a tenant who has agreed to pay it has not done so, his remedy is against the public authorities to recover back his money and not against the tenant.<sup>38</sup>

**§ 607. The exemption of the premises from taxation.** Where a lessee covenants to pay the taxes which may be levied or which may become due upon the premises during his term and it happens that by statute or otherwise the property leased is exempted from liability to a tax which otherwise the tenant would have to pay, he and not the landlord is entitled to the benefit of the exemption. The payment of the taxes for the lessor under a covenant of this sort constitutes in reality merely a payment

<sup>35</sup> Clark v. Coolidge, 8 Kan. 189, 195; Soulard v. Peck, 49 Mo. 477.

<sup>37</sup> Hamilton v. Ames, 74 Mich. 298, 302, 41 N. W. Rep. 930.

<sup>36</sup> Pursell v. Mayor, etc., of the City of New York, 85 N. Y. 330, 333.

<sup>38</sup> Clark v. Coolidge, 8 Kan. 189.

of the rent. As between the lessee and the lessor it is not material whether the former pays a certain stipulated sum for rent direct to the lessor out of which the latter will discharge his taxes or whether the lessee pays a smaller sum to the lessor and himself pays the taxes. The result to the lessee is always the same. But if the lessor's premises are exempt from taxes the lessee need not pay the taxes to the lessor as the reason for his paying them, which was to exempt the lessor from their burden, has ceased. So, where a person leased certain premises from a city with a covenant on his part to pay the taxes and assessments levied, or charged on the premises, he need not pay taxes upon the city's reversionary interest which is by statute exempt from taxation.<sup>39</sup>

**§ 608. The apportionment of taxes between lessor and lessee.** A lessee's covenant to pay taxes in a lease of a part of an estate binds him to pay only such part of the taxes assessed on the whole estate as the part demised by the lease to him bears to the entire premises. The amount must of necessity fluctuate annually according to the loss or increase in value of the whole and the judgment of the assessors. Neither can the assessors be compelled usually by an owner to assess separately the different parts of one entire piece of land. Nor will they voluntarily take into consideration in preparing the assessment maps the special agreement of individuals as to the assessment or the payment of the taxes. Hence, as neither party to the lease has power to procure a separate assessment, this method of apportioning taxes is the only possible one to be adopted where the lease is silent.<sup>40</sup> Where the assessment for a local improvement is assessed against the land of the lessor in the aggregate and only a portion of the land assessed is leased to a tenant who has agreed to pay as much of the cost of the local improvements as

<sup>39</sup> Philadelphia, etc., Co. v. Appeal Tax Court of Baltimore City, 50 Md. 397. See further as to exemption from taxation of property occupied by the lessee for a charitable purpose where the exemption was claimed by the owners. Turley Institute v. City of Memphis, 8 Heisk. (Tenn.) 845, 848, 849.

<sup>40</sup> Wall v. Hinds, 4 Gray (Mass.) 256, 269, 64 Am. Dec. 64. See also Ellis v. Bradbury, 75 Cal. 234, 236, 17 Pac. Rep. 3. A usage to apportion taxes on a building occupied by several tenants among such tenants according to their respective rents is valid and may be proved. Codman v. Hall, 9 Allen. (Mass.) 335, 338.

should be assessed against his land, equity will compel contribution by the lessee in favor of the lessor who has paid the aggregate sum levied upon the whole property as an assessment for benefit.<sup>41</sup> Particularly is this so where it appears that the name of the lessee is not in the report of the commissioners assessing the benefits and there has been no separate assessment of benefit as between lessor and lessee. Where a tenant in conformity with his covenant to pay the taxes which are assessed during the term pays the entire tax for the current year, he cannot recover a proportionate part of the unexpired term from his lessor where during the term, the lease is terminated by the destruction of the demised premises by fire.<sup>42</sup> Nor will the fact that a lessor after the termination of the lease under such circumstances sells the premises to one who agrees to pay and does pay one half the tax assessed during the term constitute any defense in favor of the lessee in an action by the lessor against the lessee to recover the tax for the entire year. The money paid by the purchaser on account of the tax was part of the purchase price which the lessor received for his property and whatever price he received or however that price was computed can have no effect on the lessee's rights under his lease.<sup>43</sup> A provision that rent shall be suspended in case of a partial destruction by fire until the premises could be rebuilt does not terminate the lease. If a lease contains no provision to apportion the liability of the tenant for taxes in case of fire his liability is absolute and unconditional and so long as the term continues, he must pay the taxes.<sup>44</sup>

**§ 609. The liability of an assignee or an undertenant to pay the taxes.** A covenant by a lessee in a lease to pay the taxes or assessments is a covenant which runs with the land. One who takes an assignment of the lease from the original lessee is bound thereby and an action may be maintained against him by the original lessor for the amount of the taxes he may have been compelled to pay and which accrues while the assignee is in possession.<sup>45</sup> This liability is based solely upon privity of

<sup>41</sup> Williams v. Craig, 2 Edw. Ch. (N. Y.) 297, 301. Pray, 117 Mass. 267; Carnes v. Hersey, 117 Mass. 269, 272.

<sup>42</sup> Wood v. Bogle, 115 Mass. 30, 32, followed in Sargent v. Pray, 117 Mass. 267, 269. Minot v. Joy, 118 Mass. 308, 310.

<sup>43</sup> Paul v. Chickering, 117 Mass. 265, 267. See also Sargent v. Salisbury v. Shirley, 66 Cal. 223, 5 Pac. Rep. 104; Peck v. Christman, 94 Ill. App. 435; Ma-

estate and hence extends only to such taxes as may be levied during the period of the assignee's possession. The original lessee continues liable to the lessor upon his own covenant to pay the taxes after he has assigned his interest in the lease. His liability to the lessor depends upon the privity of contract between them and not upon privity of estate and hence it continues during the whole term though the lessee may have parted with his interest. The liability of the assignee upon a covenant to pay taxes continues only during the term he holds the estate under the assignment. When his privity of estate ceases his liability to pay taxes also ceases.<sup>46</sup> So, where the lessee after the assignment is obliged to pay the taxes which in the lease he covenanted to pay, by reason of his privity of contract with the lessor, he may recover the amount he has been compelled to pay from the assignee though the assignee no longer has any interest in the estate.<sup>47</sup> A person who is merely a subtenant of a lessee who is liable to pay taxes is not liable to the original lessor on the covenant as there is not privity either of contract or of estate between the subtenant and the original lessor.<sup>48</sup>

**§ 610. Extent of the assignee's liability for the taxes.** The assignee of the lease whose liability to the lessor is based solely upon his privity of estate, is liable on the covenant to pay taxes only for taxes maturing or which become due and payable while the assignee holds the premises as an assignee and he is not liable

son v. Smith, 131 Mass. 510, 511; Dunlap v. Bullard, 131 Mass. 161; Abrahams v. Tappe, 60 Md. 317; Torrey v. Wallis, 3 Cush. (Mass.) 442; Wills v. Summers, 45 Minn. 90, 92, 47 N. W. Rep. 463; Trask v. Graham, 47 Minn. 571, 573, 50 N. W. Rep. 917; Hendrix v. Dickson, 69 Mo. App. 197; Lehmaier v. Jones, 91 N. Y. Supp. 687, 689; Post v. Kearney, 2 N. Y. 394, 396, 51 Am. Dec. 303, affirming 3 N. Y. Super Ct. Rep. 105; State v. Martin, 14 Lea. (Tenn.) 92, 52 Am. Rep. 167.

<sup>46</sup> Mason v. Smith, 115 Mass. 510, 511.

<sup>47</sup> Mason v. Smith, 131 Mass. 510, 511; Wills v. Summers, 45

Minn. 90, 92, 47 N. W. Rep. 463. In other words he is subrogated both at law and in equity to any and all rights of the lessor to whom he has made payment. A lessee can recover from his assignee, and also from a second assignee, the taxes accruing during their terms respectively, and which the lessee has been obliged through their default to pay to the lessor. Patten v. Deshon, 1 Gray (Mass.) 325; Burnett v. Lynch, 5 B. & C. 589; Moule v. Garrett, L. R. 5 Ex. 132, 7 Ex. 101; Farrington v. Kimball, 126 Mass. 313, 315.

<sup>48</sup> Dunlap v. Bullard, 131 Mass. 161.

for taxes which were due before he became assignee or which accrue after he ceased to be the assignee. The rule is that an assignee becomes liable to the lessor for the rent for the whole quarter or year or other rental period during which he takes the assignment though the rent may not be due until after the assignment. The rent in such cases is not apportioned. The same rule is applicable to an assignee's liability under a covenant to pay taxes. If the assignor of the lease is to continue primarily liable, and if the taxes are to be apportioned between him and his assignee, it must be expressly so stipulated in the assignment. The assignee must pay taxes which become a lien on the land while he holds it. Nor does a covenant of warranty by the assignor in the assignment render the assignor liable to pay accruing taxes or rent for such a covenant is limited in its operation strictly to the right, title and interest of the assignor in the premises and is not a warranty against liens, either existing or subsequently accruing.<sup>49</sup>

**§ 611. Whether a covenant to pay taxes binds the lessee to pay assessments for local improvements.** The decisions of the courts of the several states are irreconcilably divergent upon the question whether the lessee's covenant to pay taxes assessed upon the demised premises during the term compels him to pay assessments levied during the term for local improvements such as paving, grading and opening streets, laying sidewalks, installing sewers and similar betterments. In the first place, it may be said that the question usually is one of construction. The court must ascertain the intention of the parties to the lease from the language which they have inserted in the covenant, taking into consideration also the circumstances of the demised premises, the situation of the parties, and the character of the taxes imposed.

<sup>49</sup> *Trask v. Graham*, 47 Minn. 571, 573, 50 N. W. Rep. 917. Where the assignee of a lease is a corporation formed by the assignors and several other persons who are members of a firm and the clear intention of the assignors and the assignee is that the corporation should "step into the shoes" of the assignors, it will be presumed that the assignee assumed the unpaid debts of the assignors.

The assignee, under these circumstances will be held liable to the lessor for the payment of a tax which became due before it went into possession, though ordinarily in the absence of such circumstances a different rule would be recognized. *Fontaine v. The Schulenburg & Boeckler Lumber Co.*, 109 Mo. 55, 63, 18 S. W. Rep. 1147, 32 Am. St. Rep. 648.

The case is very clear where the covenant expressly binds the lessees to "pay taxes and assessments." But where the covenant uses only the word "taxes," the question then is, does a special assessment laid to pay for an improvement which is limited and circumscribed in the benefit it confers come within the meaning of the word "taxes." The majority of the cases hold the affirmative of this proposition. Thus, it has been held that a covenant by which the lessee agrees to pay all taxes without further specifying their character obligates him to pay assessments for local improvements such as grading, and paving and curbing the streets.<sup>50</sup> The same meaning has been given to an agreement by the lessee to pay "taxes, rates and duties of every kind,"<sup>51</sup> "all taxes and duties levied or to be levied thereon during the term,"<sup>52</sup> "all taxes, general or special,"<sup>53</sup> "all taxes and as-

<sup>50</sup> Cassady v. Hammer, 62 Iowa, 359, 361, 17 N. W. Rep. 588; Blake v. Baker, 115 Mass. 188; Codman v. Johnson, 104 Mass. 491, 493; Walker v. Whittemore, 112 Mass. 187, 189; Curtis v. Pierce, 115 Mass. 186; Delaware & H. C. Co. v. Van Storch (Pa.), 5 Lack. Leg. N. 89; Miller v. Lankard, 1 Pitts. 75, 1 Pitts. L. J. 131; Clemens v. Knox, 31 Mo. App. 185; Lucas v. McCann, 50 Mo. App. 638. *Contra*, Longmore v. Tierman, 3 Pitts. (Pa.) 62, 14 Pitts. L. J. 541; Pettibone v. Smith, 150 Pa. St. 118, 30 W. N. C. 325, 24 Atl. Rep. 693; Municipality No. 2 v. Curell, 13 La. 318; Ittner v. Robinson, 35 Neb. 133, 52 N. W. Rep. 846; McVicker Gaillard Realty Co. v. Garth, 97 N. Y. Supp. 640; Beals v. Providence Rubber Co., 11 R. I. 381, 23 Am. Rep. 472; DeClerq v. Asphalt Co., 167 Ill. 215, 47 N. E. Rep. 367. "A tax is imposed for a general or public purpose. It is levied for the purpose of carrying on the government. It is a charge on lands and other property which lessens its value, and in the proportion in which the owner is required to pay is his

pecuniary ability diminished. This is the sense in which the term 'taxation' is used and understood. On the other hand, a special assessment contains none of the distinctive features of a tax. It is assessed or levied for a special purpose and not for a general purpose. It is not a charge on property which reduces its value. The assessment is made in the ratio of advantages accruing to the property in consequence of the improvement. In no case can the assessment exceed the advantages accruing to the property assessed. It is therefore regarded but an equivalent or compensation for the increased value the property will derive from the improvement the assessment is levied to discharge." By Craig, J. in DeClurq v. Barber Asphalt Paving Co., 167 Ill. 215, affirming 66 Ill. App. 596, 47 N. E. Rep. 367.

<sup>51</sup> Curtis v. Pierce, 115 Mass. 186.

<sup>52</sup> Blake v. Baker, 115 Mass. 188.

<sup>53</sup> Thomas v. Hooker-Calville Pump Co., 22 Mo. App. 8; Lucas v. McCann, 50 Mo. App. 638.

sessments of every kind soever which should be laid or imposed on the premises during the term.”<sup>54</sup> Turning now to the decisions which sustain a contrary construction of the word “taxes,” we may notice first the peculiar character of an assessment for local improvement as distinguished from a tax. The purpose of a land tax is to secure from each owner of land in the taxing district a contribution determined as to its amount by fixed and uniform rules which he shall pay in return for his share in the general benefits of good government for the whole community, public security and protection to his property. It is an annual payment, the amount of which for any year he can with reasonable exactness ascertain by inquiry and computation and which having ascertained, he can add to the rent which he demands for his property. Special assessments, on the other hand, are based on the theory that only a portion of the community is to be specially benefited by the increase in value of particular property; and that a special payment must be made by the owners of this property in addition to what they would pay for their share of the general benefits of good government. Special assessments also are usually more or less unexpected both as to their date and their amount. Neither lessee nor lessor on executing a lease for a long term of years can tell with any degree of certainty whether or not any assessments for benefits will be laid during the term or calculate as to their probable amount. Proceeding on these and similar considerations, some of the cases hold that a covenant to pay taxes means only ordinary taxes and not local assessments of any sort.<sup>55</sup> Where by statute, municipal authorities may direct an owner of land to make certain improvements, as, for example, to lay a sidewalk, or may do the work for the owner and afterwards recover its value from him in a personal action, in neither case is there any lien upon the land, a different rule is prescribed. The statute looks to the owner

<sup>54</sup> City of New York v. Cashman, 10 Johns. (N. Y.) 96; Oswald v. Gilbert, 11 Johns. (N. Y.) 443. See also Astor v. Miller, 2 Paige. (N. Y.) 68; Trinity Church v. Cook, 11 Abb. Pr. (N. Y.) 371, 21 How. Pr. (N. Y.) 89; Cassady v. Hummer, 62 Iowa, 359, 17 N. W. Rep. 588.

<sup>55</sup> Ittner v. Robinson, 35 Neb. 133, 52 N. W. Rep. 846, 847; Beales v. Providence Rubber Co., 11 R. I. 381, 385, 23 Am. Rep. 472; Bolling v. Stokes, 2 Leigh (Va.) 178, 21 Am. Dec. 606, holding an assessment for paving not a “tax or due” under the lease.

personally and not to the land. He may construct the improvement or pay personally for it. And he and not the tenant receives most of the benefit for the improvement is a permanent one existing usually long after the lease has expired.<sup>56</sup> An agreement to pay rent "clear of all charges and assessments whatsoever" obligates the tenant to pay taxes as well as assessments.<sup>57</sup> A covenant by a tenant to comply with and execute all laws, orders and regulations of the state or of municipal authorities does not compel him to pay special assessments for public improvements.<sup>58</sup> Such a covenant refers to building, sanitary and police orders, laws and regulations.<sup>59</sup>

<sup>56</sup> *Twycross v. R. R. Co.*, 10 Gray (Mass.) 293, 295. While in a general sense the word "taxes" includes special assessments, and special assessments are made under the taxing power, yet there is a clear distinction between the two. Special assessments are a peculiar class of taxes which are laid upon property benefited according to some equitable rule, while taxes so generally understood mean the burden imposed by the government for state, city, township or school district purposes, in other words the money necessary to defray the expenses of government. Hence a promise by a lessee to pay all taxes upon the property does not apply to special assessments for the construction of sewers. *Ittner v. Robinson*, 35 Neb. 133, 52 N. W. Rep. 846. So a covenant that a lessee is to pay "all and singular the taxes, rates, charges and assessments which shall or may from time to time and at any time be levied, assessed or made on the demised premises, or in respect of the same, for or on account of any matter or cause whatever," is sufficient to cover all possible forms of taxation and will there-

fore include assessments for betterments under statutes enacted subsequently to the execution of the lease. *Walker v. Whittemore*, 112 Mass. 187, 189, followed in *Curtis v. Pierce*, 115 Mass. 186, where the words used were "rates, taxes and duties of every kind."

<sup>57</sup> *Sandwith v. DeSilver*, 1 Browne (Pa.) 221. An agreement to pay "all taxes, charges and duties" for specified years indicates strongly that only annual taxes are meant and not special assessments. But the years may be disregarded if mentioned in an express agreement to pay all taxes during the term. So it may fairly be presumed that where the premises are demised before a street is cut through or a sewer is laid the rent is in accordance with the unimproved condition. *Cassaday v. Hammer*, 62 Iowa, 359.

<sup>58</sup> *McVickar-Gaillard Realty Co. v. Garth*, 97 N. Y. Supp. 640.

<sup>59</sup> A covenant to pay taxes does not include special assessments. *McVickar-Gaillard Realty Co. v. Garth*. 97 N. Y. Supp. 640. In the case of *Beales v. Providence Rubber Company*, 11 R. I. 381, the tenant had promised to pay "the taxes of every name and kind to

**§ 612. The lessee's covenant to pay assessments.** A covenant in a lease that the lessee will pay all assessments levied during the term is confined in its operation to assessments for local improvements not differing in their character from improvements authorized by law at the time of the execution of the lease and which may fairly be considered within the settled policy of the state in reference to such improvements.<sup>60</sup> Thus, where the street on which the demised premises abutted was, at the time of the making of the lease, paved with cobblestones, it was held that the lessee was not liable to pay an assessment for paving the same with granite blocks which amounted to twice the annual rental, under his stipulation that he would pay all assessments for paving and repairing the street but not assessments for public purposes of an extraordinary character. Such an assessment was one of an extraordinary character both on account of its character and the amount which the tenant would have to pay, and the court held that the lessor would have to pay it.<sup>61</sup> Where a lessee promises in the lease to pay all assess-

be placed on the premises at any time during the term." In construing this the court recognized a distinction between the scientific meaning of the word "tax" and its meaning as ordinarily used. An assessment, says the court, is a tax. That word as ordinarily used means a payment of money exacted for the public service and not by way of compensation for benefits conferred. The truth is that where men speak of land as subject to taxes they do not have any assessment for benefit in mind which though technically taxes are not so called in ordinary conversation. In very many cases exemptions from "taxation" have been held not to be exemption from the payment of assessments for benefits. The mere fact that the lease conditions the express "taxes of every kind and name" does not extend the provision.

These words simply mean taxes commonly so-called and nothing else. The court in this case pointed out that in all instances where the word "taxes" when used in a lease was held to include assessments, there were other words used in connection with the word "taxes" which has extended its meaning. Thus, the covenant has been to pay "taxes and assessments," "rates, taxes and duties," or "taxes and duties," or some such terms.

<sup>60</sup> *Borgman v. Spellmire*, 4 Ohio N. P. 416, 7 Ohio Dec. 344. The tenant must pay an assessment for a public sewer, where he binds himself to pay all assessments. *Cram v. Munro*, 1 Edw. Ch. (N. Y.) 123; *Budd v. Marshall*, 42 L. T. 793, 5 C. P. Div. 481.

<sup>61</sup> *Ten Eyck v. Rector, etc., of Protestant Episcopal Church*, 141 N. Y. 588, 58 N. Y. St. Rep. 520,

ments levied, the lessor may at once recover the amount which has been assessed as soon as it has been levied. The whole assessment is then due the lessor in case the lessee shall not pay, and the latter cannot, as against the lessor, compel him to take it in instalments by filing a written waiver of illegality under a statutory provision which enables an owner to pay an assessment in yearly instalments provided he shall in writing waive all illegality in the assessment.<sup>62</sup> A covenant by the tenant to pay "rates, taxes and outgoings," binds him to pay the expenses of paving the street in front of the demised premises and the landlord having paid them may recover the same from the tenant.<sup>63</sup> A covenant by the tenant to pay a proportionate share of repairing and maintaining a road until it should be taken over by the city, for which otherwise his landlord would be liable, does not bind the tenant to pay a share of a large sum of money which his landlord had spent in completing the road by an arrangement with the authorities in order that the road might the sooner be taken over by them.<sup>64</sup> A covenant to pay "taxes and assessments assessed or imposed at any time," binds the tenant to pay an assessment for paving new streets, though the work thereon was not commenced until after the term had expired where the notice of the assessment was given to the landlord during the term. Under the covenant in question the tenant became liable to pay as soon as the cost of the paving was apportioned to the several owners of property facing on the streets to be paved. The landlord may, it was also held, pay the assessment as soon as it becomes a lien on the premises and he need not wait for any formal demand on him or a threat of proceeding. On his paying the assessment, the right of action against his tenant accrues to him and he may sue on the covenant at once.<sup>65</sup> A covenant by the tenant to pay "all outgoings of any description for the time being payable in respect of the

36 Atl. Rep. 739, affirming without opinion 20 N. Y. Supp. 157, 65 Hun, 194, 29 Abb. N. C. 150.

<sup>62</sup> Vorse v. Des Moines Marble & Mantel Co., 104 Iowa, 541, 73 N. W. Rep. 1064.

<sup>63</sup> Greaves v. Whitmarsh, Watson & Co., 75 L. J. K. B. 633

(1906), 2 K. B. 340, 95 L. T. 425, 70 J. P. 415, 4 L. G. R. 718.

<sup>64</sup> Scott v. Brown, 69 J. P. 89, 4 L. G. R. 103.

<sup>65</sup> Wix v. Rutson, 68 L. J. Q. B. 298, (1899) 1 Q. B. 174, 80 L. T. 168.

premises," binds the tenant to pay the expenses of reconstructing the drainage of the house.<sup>66</sup> But such a covenant, when it is contained in a lease creating a tenancy from year to year, does not bind the tenant to pay the expense of abating a nuisance on the premises under a notice from a board of health. In holding this, the English court relied upon the shortness of the term and upon the fact that the expense which it was sought to charge against the tenant, was equal to one year's rent. Considering these circumstances, the court considered that it was inconsistent with the presumed intention of the parties to charge the tenant with so great an expense when the premises and not the tenant would receive all the benefit and having in view the shortness of his term.<sup>67</sup> A covenant by the tenant to pay all taxes, rates, duties, assessments and impositions, binds him to pay the expense incurred by his landlord in taking up and replacing defective drains, which he was compelled to do by the city authorities having charge of the public health.<sup>68</sup> But in the absence of an express covenant by the tenant to pay the expense which the landlord incurs in abating a nuisance or such a covenant created by absolutely necessary implication, the mere fact that a tenant agrees to pay assessments, taxes or charges and impositions assessed against the premises does not compel him to pay the landlord expenses which result from the latter removing a nuisance.<sup>69</sup> A covenant by the tenant that he would "pay and discharge taxes, rates and all impositions whatever which are or which at any time during the term may be charged or imposed upon the premises," binds him to remove a nuisance on the premises and to restore them to a proper and sanitary condition under a notice of the health department. In this case after speaking of the very numerous decisions construing cove-

<sup>66</sup> Stockdale v. Ascherberg, 73 L. J. K. B. 206, (1904) 1 K. B. 447, 90 L. T. 111; 52 W. R. 289, 68 J. P. 241, 2 L. G. R. 529, 20 L. T. R. 235.

<sup>67</sup> Harris v. Hickman, 73 L. J. K. B. 31, (1904) 1 K. B. 13, 89 L. T. 722, 68 J. P. 65, 2 L. G. R. 1, 20 T. L. R. 18, applying Valpy v. St. Leonard's Wharf Company, 1 L. G. R. 305, and distinguishing

Stockdale v. Ascherberg, 72 L. J. K. B. 492, (1903) 1 K. B. 873.

<sup>68</sup> Payne v. Burridge, 13 L. J. Ex. 119, 12 M. & W. 727, followed Brett v. Rogers, 66 L. J. Q. B. 287, (1897) 1 Q. B. 525, 76 L. T. 26, 45 W. R. 334.

<sup>69</sup> Tidswell v. Whitworth, L. Rep. 2 C. P. 320; Rawlings v. Briggs, 3 C. P. Div. 368.

nants of this character, the court spoke of the danger of giving the words too broad a meaning. The court suggested that a covenant of this kind by which the tenant is bound to meet impositions on the premises, might compel him to rebuild the house which had been leased to him in case the authorities decided or determined, as they sometimes have power to do under statutes, that the ruinous condition of the building necessitated its complete removal as a nuisance. But the court said as meeting this suggestion, that a covenant of this kind must be construed to include only such items of expense as were in the minds of the parties at the time of making the lease. This would mean the ordinary charges arising out of taxes or assessments and not such extraordinary charges as would occur without any reasonable expectation on the part of the parties to the lease.<sup>70</sup> A sum estimated by street opening commissioners as the benefit to the property resulting from the opening of a street, and by them deducted from the amount of an award granted for property taken in the opening, is an assessment which comes within a lessee's covenant to pay all assessments. This he must pay to the lessor though the latter has been fully compensated for the portion of his property which has been taken for the public improvement. Nor is this rule affected in a particular case because the authorities have apportioned the assessment between the lessee and lessor.<sup>71</sup> A covenant by a tenant to pay taxes,

<sup>70</sup> Foulger v. Arding, 71 L. J. K. B. 499, (1902) 1 K. B. 700, 86 L. T. 488, 50 W. R. 417. In England it has been held that the lessee's covenant to pay assessments binds him to pay apportioned paving expenses under the public health act. Weld v. Clayton le Moors Urban Council, 86 Law T. 584, and the cost incurred by the lessor in abating a nuisance caused by defective drains in compliance with a notice served on the landlord by the sanitary board under the same statute. Brett v. Rogers, (1897) 1 Q. B. 525; Smith v. Robinson, 5 Reports, 469, Id. (1893) 2 Q. B. 53; Farlow v. Stevenson, 69 Law J. Ch. 106, (1900) 1 Ch.

128, 81 Law T. (N. S.) 589, 48 Wkly. Rep. 213; Foulger v. Arding, 71 Law J. K. B. 499, (1902) 1 K. B. 700, 86 Law T. 488, 50 Wkly. Rep. 417.

<sup>71</sup> Arthur v. Harty, 40 N. Y. Supp. 1091, 1093, 17 Misc. Rep. 641, also holding that the rights of the lessor are in nowise affected by the statute which in New York, provides that a just and equitable assessment of the loss and damage shall be made as such statute must be read and construed in connection with the provision requiring the commissioners to report fully and separately the amount of loss and damage and of benefit and advantage to each and

charges, rates, assessments and "impositions" includes charges against the premises for the paving of new streets imposed under a statute.<sup>72</sup> A covenant by a tenant to pay his proportionate share of repairing a road upon which the demised premises fronted in common with other houses adjoining does not bind him to pay a proportionate share of a reconstruction of the road which was undertaken by the landlord in connection with the public authorities in order that the road might be taken over by the public authorities.<sup>73</sup> The expense of erecting a fire escape under an obligation imposed by statute on the landlord is not such an "expense imposed or outgoing charged on the owner, in respect of the premises" as will make the tenant liable under his covenant to pay "taxes, rates and impositions and outgoings, which are imposed upon or in respect of the demised premises by a statute." These words as used in the covenant evidently mean and are intended by the parties to mean the usual and customary taxes and charges which recur from time to time and not meant to include an extraordinary and unusual expense which by statute the landlord has been compelled to undergo. In other words, the language of the above covenant is not broad enough to include an unusual and exceptional expense or outgoing. But a covenant in the same lease which bound the tenant to pay the "expense or a fair share thereof, which the lessor might be compelled to pay by any pulling down, rebuilding or repairs of any portion of the building which he might have to make by virtue of any statute," is broad enough to include the expense of erecting a fire escape by the lessor under the compulsion of a statute.<sup>74</sup>

**§ 613. The payment of the taxes by the mortgagee of a leasehold.** A mortgagee of a lessee has a right to pay the taxes which the mortgagor had covenanted in the lease to pay though the lease has been assigned to one who neglects to pay taxes.

every owner, lessee and party. Arthur v. Harty, 40 N. Y. Supp. 1091, 1092, 17 Misc. Rep. 641. A covenant by the tenant to pay taxes, rates, duties and assessments imposed on the premises includes the expense of paving in front of same. Thompson v. Lapworth. L. Rep. 3 C. P. 149, but

see *Contra*: Baylis v. Jiggens, 67 L. J. Q. B. 793, (1898) 2 Q. B. 315, 79 L. T. 78.

<sup>72</sup> Wix v. Rutson, 68 L. J. Q. B. 298, (1899) 1 Q. B. 474, 80 L. T. 168.

<sup>73</sup> Scott v. Brown, 68 J. P. 181.

<sup>74</sup> Arding v. Economic Printing & Publishing Co., 79 L. T. 420.

Where he has to do this to protect his own interest in the premises and to prevent the lessor from re-entering the premises which he might do according to the lease on the failure of the lessee to pay taxes, he is subrogated to all the rights and remedies which the lessor may have had under the lease against either the assignee who is in possession or against the assignor on his original agreement to pay taxes. Though there be no privity between the mortgagee and the assignee, he may maintain a common law action against the assignee to recover the rent and the taxes which he has been compelled to pay to protect himself. The right which he takes to proceed against the assignee is a right which the original lessor had against the assignee. He is not a mere stranger making a voluntary payment of a debt of another. He is in fact compelled to pay the debt of the assignee to protect his own rights and to save his own property.<sup>75</sup>

**§ 614. The forfeiture of the lease for a breach of a condition or a covenant by the lessee to pay pay the taxes.** Where the lessee covenants to pay the taxes, the lessor may have a right to re-enter and take possession on the failure of the lessee to do so. Whether the payment of taxes by the tenant is a condition subsequent upon whose breach the landlord may enter for a forfeiture is always a question of the construction of the lease. A provision that the lease shall be forfeited in case the tenant shall fail or neglect to perform any covenant of, or in the lease, obviously is applicable to a covenant by the tenant to pay taxes. Hence it has been held that the failure of a tenant to pay water rates which he has expressly agreed to pay by a covenant in the lease, will create a forfeiture where the lease provides for forfeiture in case the tenant shall fail to perform all of the terms and stipulations of the lease.<sup>76</sup> The acceptance of rent by the lessor with knowledge of the breach of the covenant to pay taxes is a waiver of the forfeiture caused by the tenant's failure to pay taxes.<sup>77</sup> The court, in construing a stipulation in a lease inflicting a forfeiture of the lease and of the improvements erected by the tenant on a failure by him to pay taxes, will be sat-

<sup>75</sup> *Dunlop v. James*, 174 N. Y. 202, 30 W. N. C. 115, 23 Atl. Rep. 411, 414, 67 N. E. R. 60, affirming 75 N. Y. Supp. 65.

<sup>76</sup> *Hand v. Suravitz*, 148 Pa. St. 594, 601, reversing 24 Hun, 617, 103 N. Y. 672.

<sup>77</sup> *Conger v. Duryee*, 90 N. Y. 594, 601, reversing 24 Hun, 617, 103 N. Y. 672.

isfied with a substantial performance of the stipulation by him and will seek for circumstances sufficient to save a forfeiture. Where a lessee on penalty of a forfeiture is bound by his lease to pay, during the term, taxes which shall accrue, it is sufficient if he shall pay the taxes in the ordinary course of their collection so that they do not become a burden on the lessor. Whether paid by the lessee before or after the expiration of the term is not material.<sup>78</sup> A lessor who seeks to enforce a forfeiture of the lease for the default of the lessee in paying taxes cannot claim a right of re-entry until he has demanded of the lessee that he shall pay the taxes. And if the lessee shall pay the taxes before re-entry by the lessor under a clause of forfeiture, the forfeiture is saved, for the option to re-enter is in the lessor and until the option is exercised and the lessor re-enters, the lease is still valid and the lessee may pay though the term of the letting has expired.<sup>79</sup>

<sup>78</sup> Allen v. Dent, 4 Lea (Tenn.) 676.

<sup>79</sup> Planters' Insurance Co. v. Diggs, 8 Baxt. (Tenn.) 563, 568. *Contra*, holding that no demand is necessary before forfeiture. Bacon v. Park, 19 Utah, 246, 57 Pac. Rep. 28. See also Davis v. Bur-rill, 10 C. B. 822. In construing a lease which provided that the lessee shall pay his own gas and water bills, the court said that this was not a mere declaration as to who was to pay for the gas and water furnished on the premises. It was a covenant, and perhaps a condition. Certainly there was nothing ambiguous in it, as to who was to pay the water rates and the court also said: "The water rents are payable as every intelligent man knows to the water company furnishing the water. When, therefore, a tenant covenants in his lease to pay the gas bills or the water rents it is as much a condition of his holding as other covenants therein. If they are not paid and the tenant vacates the premises the landlord

is obliged to pay them or have the gas and water cut off on his premises. The latter has a right to protect himself against this and to enforce a lawful covenant for that purpose in the lease. It was held in Fernwood Masonic Hall Association v. Jones, 102 Pa. St. 307, that wherein a lessee covenants to pay the lessor for all gas consumed on the premises the sum due for gas consumed is to be regarded as rent in arrears and may be distrained for. While forfeitures are not favored in the law I apprehend no one will dispute the right of a landlord to forfeit for non-payment of rent where apt words of forfeiture are inserted in the lease. The right is equally clear to forfeit for non-payment of water rents where that is the agreement of the party. In the case at hand a tenant distinctly agrees that his lease might be forfeited for such non-payment. He could have avoided it by paying the bills." Hand v. Suravitz, 148 Pa. St. 202, 23 Atl. Rep. 1117.

**§ 615. Equitable relief from forfeiture for non-payment of taxes by the tenant.** A court of equity will relieve a tenant from a forfeiture of his lease for the non-payment of the taxes which are agreed to be paid by him as a part of the rental consideration equally with a forfeiture for the non-payment of the rent itself. The fact that the lessee has allowed the leased property to be sold for taxes and a tax deed to be given to a stranger to the lease will not prevent his receiving equitable relief where he shows a good reason for his neglect to pay the taxes. He may institute a suit in equity making the lessor and the grantee in the tax deed parties to it. He may enjoin the lessor from recovering the possession because of the forfeiture and the existence of the tax deed is not at all material as against his right to an injunction. For, if the deed is valid, the lessor has then no right of re-entry, while if it is voidable, the deed is no obstacle to a redemption by either lessor or lessee for the situation is then the same as though no deed had ever been given. And where it appears in the suit in equity brought to declare the tax deed void, that the deed was procured as the result of an arrangement entered into by the lessor and the grantee in the tax deed to compel the surrender of the premises by the lessee and to put the holder of the deed in possession, it will not be given any consideration whatever as an obstacle to equitable relief to the lessee.<sup>80</sup>

**§ 616. The landlord's lien for unpaid taxes.** If it be assumed that the payment of taxes by the lessee is equivalent to a payment of rent to the landlord, it may be safe to say that the latter, upon default in payment of taxes by the tenant shall enjoy and may prosecute the same remedies which he would have under the statute giving him a lien on the personal property of the tenant upon his default in the payment of rent. This question has received little if any consideration by the courts.<sup>81</sup> The absence of adjudicated cases arises mainly because of the fact that covenants binding the lessee to pay taxes are usually found in leases of city real property to which the statute creating the landlord's lien for rent and advances to the tenant has generally no application. The fact that a landlord extends the tenant's time within which he must pay the taxes does not release the

<sup>80</sup> Webb v. King, 21 App. D. C. 141.      <sup>81</sup> See Roberts v. Sims, 64 Miss. 597, 2 So. Rep. 72.

liability of the surety on the lease. And the lessor may when the taxes are not paid, sue the lessee's surety without first demanding that the taxes shall be repaid by the lessee.<sup>82</sup>

**§ 617. The measure of the lessor's damages for the lessee's default in paying the taxes.** The measure of the lessor's damages for the default of the lessee in paying the taxes is the amount of the taxes which are unpaid, with interest to the date of action. This is the rule though, through the act of the lessee, the premises have been sold for the non-payment of the taxes. For the lessee's agreement to pay taxes is not to indemnify the lessor for all the consequences which may result from his failure to pay the taxes but an original agreement to pay the taxes when they are due which is broken as soon as the taxes become due and are unpaid by the lessee. The lessor may sue without first paying the taxes, for the taxes which the lessee agreed to pay are then a debt which he owes the lessor and the only other damage which results to the lessor is the interest on the debt. The lessor however, may pay the taxes and sue at once for the amount he has paid and this is always advisable. He cannot, however, stand idle and suffer the loss of his property and fasten the damage for these avoidable consequences upon the lessee whose obligation was not to indemnify but affirmative and positive in its character.<sup>83</sup>

**§ 618. Personal liability to a judgment for taxes.** The liability to a personal judgment in favor of a city for taxes or assessment is purely statutory. The statute is usually very strictly construed. If it gives a remedy in the shape of a personal judgment against the owner of the premises, an action cannot be maintained against the lessee of the owner though he has agreed with his lessor to pay taxes and assessments.<sup>84</sup> A covenant in a lease that a lessee shall pay "taxes, charges, and assessments, ordinary and extraordinary which shall be taxed, charged or assessed on the premises or any part thereof or on

<sup>82</sup> Haynes v. Synnott, 160 Pa. St. 180, 185, 32 W. N. C. 107.

<sup>83</sup> Fontaine v. Schulenberg & Boeckler Lumber Co., 109 Mo. 55,

60, 18 S. W. Rep. 1147, 32 Am. St. Rep. 648; Trinity Church v.

Higgins, 4 Rob. (N. Y.) 1, reversed in 48 N. Y. 532. See also to same effect Webster v. Nichols, 104 Ill. 160.

<sup>84</sup> Davis v. Cincinnati, 36 Ohio St. 24, 277.

the said parties of the first part, *i. e.*, the lessors, their heirs and assigns in respect thereof," does not bind the lessee to pay a tax imposed on rents reserved on leases in fee. When such a tax is paid by the tenant under the compulsion of the statute he may legally deduct the amount from the rent. For a covenant by a tenant to pay taxes on the demised premises means exclusively the land and property which is leased and which is put in the possession of the tenant. Hence, it is clear that such a covenant does not mean that the lessee shall pay a tax upon the rent which is merely the consideration paid by him for the use of the premises. Nor can the rents of property which is demised be regarded as a part of the property from which they proceed so that theoretically a tax upon the rent which is the issue and profit of the premises to the owner could be construed to be a tax upon the premises themselves.<sup>85</sup>

**§ 619. The lessee's covenant to insure.** A covenant by a lessee with his lessor to keep the premises insured will receive a reasonable construction. The lessee is not bound to take out a policy under which he as the lessee shall receive no protection; if he shall be able and willing to procure one which, while protecting his own interests in the premises, also affords sufficient protection to the lessor. The lessee is under no obligation to renew a policy on the premises which was alive when he accepted the lease and by which the lessor only was protected, but he may insure the premises for the benefit of the lessor and the lessee as their respective interests may appear in a company to be selected by the lessee subject to the lessor's approval. The lessor cannot claim a forfeiture on the refusal of the lessee to renew the policy in which only the lessor's interest is insured which expires during the term.<sup>86</sup> If by reason of the condition or character of the demised premises, or the use to which they are put by the lessor, or by other lessees at the date of the lease, a lessee who has covenanted to insure is absolutely unable to procure the insurance which he has promised to get, he will be excused from the performance of his contract. The fulfillment of

<sup>85</sup> Woodruff v. Oswego Starch Co., 74 N. Y. Supp. 961, 965, in which there may also be found a somewhat general discussion of

the nature of leases in fee reserving a perpetual rent.

<sup>86</sup> Sherwood v. Harral, 39 Conn. 333, 336.

the covenant to insure being an impossibility, its non-performance will be excused.<sup>87</sup> The difficulty or improbability of procuring the required amount of insurance however great will not alone excuse the covenantor. Nothing short of proof that the insurance cannot be obtained will constitute impossibility of performance of the covenant to insure. For if the lessee agrees to do a thing which is possible for him to do when he agrees to do it, he cannot escape liability under his covenant because of the fact that, by the occurrence of some unforeseen and inevitable contingencies, the thing which he has agreed to do has become impossible. This may and ought to be foreseen and anticipated by the lessee and, if it is foreseen, he must see to it that it is provided against by the terms of the lease. The tenant must use the utmost diligence and good faith in his efforts to procure the requisite amount of insurance under his covenant to insure. He may find it difficult to do so but his failure will not be excused by this or by the loss of time or by inconvenience or expense which may attend his efforts so long as his failure is not caused by any misconduct or negligence on the part of the lessor or his assignee. Merely making inquiries of two or three insurance companies is not enough if it were possible under all the circumstances to do more.<sup>88</sup> A covenant to procure insurance and to keep premises insured is not void for uncertainty but means insurance against fire. A covenant to insure on a certain date and to keep insured is not satisfied unless the insurance is kept alive during the whole term. Hence the failure of the lessee to procure insurance by the date fixed does not exempt him from doing so after that date and continuing the insurance during the whole term.<sup>89</sup> The lessee's agree-

<sup>87</sup> *Metropolitan Land Co. v. Manning*, 98 Mo. App. 248, 71 S. W. Rep. 696.

<sup>88</sup> *Jacksonville M. P. Ry. & Nav. Co. v. Hooper*, 160 U. S. 514, 529, 16 Sup. Ct. 379, 40 Law. ed. 515. For a case in which the lessors having paid premiums for insurance which the lessees had covenanted to pay, were unable to recover them back from the tenant though the insurance had been in-

validated by the acts of the lessee. See *Shirk v. Adams*, 130 Fed. Rep. 441.

<sup>89</sup> *Rhone v. Gale*, 12 Minn. 54, 59, also holding that an agreement to insure and to keep insured is not too vague and uncertain to be enforced but clearly means an insurance against fire. The court relied greatly on the covenant to keep insured.

ment to insure the premises and to assign the policy to the lessor is not broken by him if he procures the insurance, but discontinues assigning the policy with the consent of the lessor after being in possession a year or two. The court of equity would regard the policy as being held by the lessee in trust for the lessor.<sup>90</sup>

**§ 620. The tenant's covenant to pay increased insurance rates.** A tenant whose use of the demised premises or of a portion of it will increase the insurance rates which will have to be paid by the landlord or by tenants occupying other portions of the building may covenant with the landlord that he will pay him such increased rates over a certain per cent. Where he does so in absolute terms it is not material that any increase of rates by the insurance company was not directly due to the acts of the covenantor or that the amount of which the landlord was compelled to pay under his covenant to the other tenants was in fact paid by the landlord or not.<sup>91</sup> Where the lessor is to keep the premises insured and the lessee agrees to pay all extra insurance occasioned by the extra-hazardous character of the use which the lessee made of the premises the lessor has a large discretion as to insurance. They must keep the premises well insured and may determine in what companies the insurance will be placed, change from one company to another as they may think proper, fix the total amount of insurance to carry on the premises and agree on rates and premium without consultation with the lessee. Their only duty to the lessee is to exercise this discretion in good faith and to act with reasonable diligence and prudence to protect the interests of the lessees. Where no time is fixed in the lease for an accounting by the lessees to the lessor, the lessees are bound to pay the lessors the premiums from time to time as they are paid by the lessors subject to a final accounting to adjust increases or diminutions in the rates. Where an adjustment and settlement has been had of insurance between the lessor and lessee covering a certain period in the

<sup>90</sup> Eberts v. Fisher, 54 Mich. 294, holding in substance that no written assignment was required in equity and that there was no forfeiture by the breach. Under such circumstances in equity at least if the lessee in case of the

destruction of the premises by fire collected the insurance he would be compelled to turn the money over to the lessor.

<sup>91</sup> Noel v. Herman Bencke Lith. Co., 134 N. Y. 617, 32 N. E. Rep. 649, no opinion, 11 N. Y. Supp. 589.

future, the lessee cannot during that period do anything which will increase the hazard and thereby increase the rate which the lessor will have to pay during that period without agreeing to pay or being responsible for the increase of rates. The lessor also, having adjusted and received the amount to be paid him by the lessee for a specified future period cannot cancel the policies to avoid the payment of premiums. It is his duty to keep the premises well insured so that if the companies in which he has placed the insurance shall fail, he must re-insure at his own expense in other companies.<sup>92</sup>

**§ 621. Forfeiture in case of a breach of condition to insure.** A covenant or a condition by a lessee to keep the demised premises insured against loss by fire is broken the moment they are uninsured.<sup>93</sup> Insurance by the lessee in his own name alone is a breach of a condition to insure the premises in the names of the lessor and lessee jointly.<sup>94</sup> So, on the other hand, taking out insurance in the names of the lessor and lessee is a breach of a covenant to insure in the name of the lessor only.<sup>95</sup> If the breach of a condition or covenant to insure is the result of a wilful and intentional neglect on the part of the covenantor to procure fire insurance on the premises according to the express stipulations of the lease, a forfeiture will result against which equity will not grant relief.<sup>96</sup> If, however, the failure to insure

<sup>92</sup> Quincy v. Carpenter, 135 Mass. 102, 106.

<sup>93</sup> Doe v. Peck, 1 Barn. & Adol. 428.

<sup>94</sup> Doe v. Gladwin, 6 Q. B. 953.

<sup>95</sup> Penniall v. Harborne, 11 Q. B. 368.

<sup>96</sup> Rolfe v. Harris, 2 Price, 206n; Reynolds v. Pitt, 19 Ves. 134; White v. Warner, 2 Mer. 459; Green v. Bridges, 4 Sim. 96, 101; Thompson v. Guyon, 5 Sim. 65; Gregory v. Wilson, 9 Hare, 683, 689; Nokes v. Gibbons, 3 Derw. 68; Job v. Bannister, 2 Kay & J. 374. The English cases in equity hold the tenant very strictly to his liability upon his covenant to insure. The omission to insure says the Lord Chancellor in White v. War-

ner, 2 Mer. 459, is stronger against the tenant than an omission to repair, because in the latter case the landlord may by the exercise of due vigilance see to the observance of the covenant, but where the lessee has agreed to insure the lessor must rely on him to keep his covenant. To this it may be said that the lessor may insure at the expense of a lessee who has failed to observe his covenant to insure and may recover at law the premiums paid. In Green v. Bridges, 4 Sim. 96, 101, the court refused to overlook a failure to insure on the part of a lessee upon the ground that first the breach or failure to insure was willful and second that a

in conformity with the stipulations of the lease is the result of accident or mistake on the part of the covenantor and he has acted in good faith in procuring insurance though it may not be payable to the person who is named as the beneficiary in the lease, equity will grant relief according to the circumstances of the case.<sup>97</sup> Thus, if the lessee intending to have policies renewed which were satisfactory to the lessor by a mistake of his agent takes out new policies which do not conform to the requirements of the lease and the lessor has not been injured and can readily be placed *in statu quo*, there will be no forfeiture of the lease. The premises have been insured during the term. But the ruling of the court might be otherwise if there had been a total forgetfulness to procure any insurance for such conduct would approach too closely to negligence to be excusable even in equity.<sup>98</sup> So, where a lessee having covenanted to keep the premises insured in companies approved by the lessor takes out policies in his own name jointly with that of the lessor, the lease cannot be forfeited under a clause providing for a forfeiture in the event of the failure of the lessee to perform his covenant to insure. The lessee under such a covenant is not bound to renew a policy on the premises previously taken out by the lessor in his own name. Nor will his refusal to pay to the lessor the premium paid by him for a policy taken out by the lessor without notice

court of equity would not relieve against a forfeiture except in a case where the payment of money would be a complete compensation and where by such payment the landlord would be put into the position he was entitled to hold under the covenant. In *Thompson v. Guyon*. 5 Sim. 65, 72, the failure of the lessee to insure as he had agreed to do was held to excuse a landlord from executing a renewal of the lease. The lease gave a right of entry on a breach of condition and the lessor covenant-ed that he would renew at the end of the term if the lease should not be sooner determined by any act or default of the lessee. The

latter continued in possession af-  
ter the end of the term, but per-  
mitted the premises to remain un-  
insured during several months of  
the term of which the landlord  
had no notice until eight months  
after the term expired. Though  
absolutely no injury had been  
caused to the landlord by the fail-  
ure of the tenant to insure, the  
court of equity dismissed his bill  
to procure a specific performance  
of the agreement by the lessor to  
renew.

<sup>97</sup> *Mactier v. Osborn*, 146 Mass. 399, 15 N. E. Rep. 641, 645, 4 Am. St. Rep. 323.

<sup>98</sup> See *Keteltas v. Coleman*, 2 E. D. Smith (N. Y.) 408.

to the lessee constitute a forfeiture.<sup>99</sup> A covenant by the tenant to insure is a continuing covenant. He must usually keep the premises insured during the whole term. Hence, the receipt of rent while the premises are uninsured is not a waiver of a condition incumbent on the tenant to keep them insured.<sup>1</sup> A covenant that the lessee, his executors and assigns will insure and keep insured during the term and deposit the policy with the lessor is a continuing covenant. It does not mean merely that the lessee shall take out one policy and keep that policy on foot but that he shall at all times keep the premises insured by one policy or another. Assuming the latter meaning to be correct, the condition is broken if the premises are uninsured at any time and as this is a continuing breach, it follows that the levy of a distress is a waiver of any forfeiture down to the date of the distress yet it is no waiver or estoppel on the lessor where the premises remain uninsured after the distress.<sup>2</sup>

**§ 622. When the covenant to insure runs with the land.** It has been doubted in some of the cases whether a covenant by the lessee to insure the premises runs with the land. For a covenant in a lease in order to run with the land must have for its purpose to effect something to sustain the estate and the enjoyment of it, and must be meant to benefit both the lessor and the lessee. The distinction is obvious. A covenant to insure which is for the benefit of the lessor only as, for example, where the money to be paid in the event of a destruction of the premises by fire would go to him without any obligation on his part to rebuild the premises, is a collateral covenant and does not run with the land. But a covenant by the lessor to insure and binding the lessor to use the money to rebuild is in its nature a covenant by the lessor to repair and runs with the land.<sup>3</sup> The assignee of a lessee is bound by a covenant to insure which runs

<sup>99</sup> *Sherwood v. Harral*, 39 Conn. 333. A lease conditioned to be void if the lessee "fails to pay all extra insurance," is not forfeited merely because he has failed to pay extra insurance unless it also appears there was money due for extra insurance. *Adams v. Goddard*, 48 Me. 212.

<sup>1</sup> *Gregory v. Wilson*, 9 Hare, 683, 688.

<sup>2</sup> *Doe d. Flower v. Peck*, 1 Barn. & Adol. 428, 435.

<sup>3</sup> *Masury v. Southworth*, 9 Ohio St. 340, 349.

<sup>4</sup> *Masury v. Southworth*, 9 Ohio St. 340.

with the land.<sup>4</sup> A covenant by the lessee to keep the buildings insured for a portion of their value and in case of their destruction by fire to use the proceeds for rebuilding or to pay the proceeds over to the lessor runs with the land.<sup>5</sup> But a person who has merely an equitable right to or lien upon the premises and who goes into possession thereunder without acquiring any legal title cannot be regarded as an assignee of the lease.<sup>6</sup> So, where a lessee covenants to keep the premises insured and then he employs a builder to erect improvements thereon for which the lessee is unable to pay in consequence of which the builder begins an action to foreclose a mechanic's lien and by reason of a decree entered therein enters upon the premises without a sale, he is not an assignee of the lease and hence is not liable to the lessor upon the lessee's covenant to repair. And where the builder while thus in possession insures the premises for his own benefit to the extent of his own interest, the policy does not enure to the lessor or to his assigns nor does his action render the builder liable on the covenant to insure contained in the lease.<sup>7</sup>

**§ 623. The measure of the damages for a failure to insure.** The cases do not agree as to the measure of damages in the case of a breach of a covenant to insure. It has been held in some cases that a lessee who fails to keep his covenant to keep the premises insured is liable to his lessor for the amount of the damages which result in case of fire destroying the same to the extent of the loss sustained by the lessor not exceeding the amount of the insurance which he has agreed to procure.<sup>8</sup>

<sup>5</sup> Northern Trust Co. v. Snyder, 76 Fed. Rep. 34, 22 C. C. A. 47.

<sup>6</sup> Jenks v. Partman, 1 Keene, 436; Arkwright v. Colt, 2 Y. & Coll. C. C. 4.

<sup>7</sup> Merchants' Insurance Co. v. Mazange, 22 Ala. 168. A covenant which binds a tenant to take out a policy of insurance immediately and afterwards that he and his assigns will keep that particular policy alive will not render an assignee guilty of a breach if the lessee never insures, for there never was any policy which the assignee could continue. A dis-

tress against the tenant or the assignee waives the tenant's forfeiture. But if the covenant is that a tenant and his assigns shall keep the premises insured, it is broken if they are uninsured at any one time. It is a continuing breach of covenant. A distress therefore levied at any time the premises remain uninsured is not a waiver. Doe d. Flower v. Peck, 1 B. & Ad. 428, 9 L. J. Q. B. 60.

<sup>8</sup> Douglas v. Murphy, 16 U. C. Q. B. 113. See also same principle where the relation of landlord and tenant was not involved. Gray v.

Murray, 3 John. Ch. (N. Y.) 167; Perkins v. Washington Insurance Co., 4 Cow. (N. Y.) 645; Soule v. Union Bank, 45 Barb. (N. Y.) 111, 30 How. Pr. 105; Ela v. French, 11 N. H. 356; Miner v. Taggart, 3 Binn. (Pa.) 205; French v. Reed, 6 Binn. (Pa.) 308; Morris v. Summerl, 2 Wash. C. C. 203; DeTaslet v. Crousellat, 1 Wash. C. C. 504, 7 Fed. Cases, 3827; Hawkins v. Coulthurst, 5 Best & S. 342. So when a tenant agrees to keep premises insured for a certain fixed sum during the term, and fails to do so without a sufficient cause and the premises are worth at least the sum mentioned he will, on their total destruction by fire, be liable to the landlord for the fixed sum as damages. Jacksonville M. P. Ry. & Nav. Co. v. Hooper, 160 U. S. 514, 529, 16 Sup. Ct. 379, 40 Law. ed. 515. National Mahaiwe Bk. v. Hand, 80 Hun, 584, 30 N. Y. Supp. 508, id. 89 Hun, 529, 35 N. Y. Supp. 449, holds that the true measure of damage is the cost of effecting the insurance and not the amount. This case, however, is solitary and

has the whole weight of the decisions against it. In the case of Lincoln Trust Co. v. Nathan (Mo. App.), 99 S. W. Rep. 484, the tenant agreed to spend a certain amount for improvements on the land which were to belong to him until the expiration of the term upon which the improvements were to become the property of the landlord. It was also agreed that, in the event of the destruction of the building by fire, the proceeds of the insurance should be devoted to replacing the improvements with a new building. During the term the improvements were destroyed by fire and the lease was rescinded because of the delay on the part of the landlord in restoring the buildings. The tenant had the buildings insured in his name and the court held that the landlord was entitled as against the tenant to receive such a proportion of the insurance money received by the tenant as the portion of the term before the destruction by fire bore to the entire term of the lease.

## CHAPTER XXVI.

### THE ASSIGNMENT OF THE LEASE.

- § 624. The general rule as to tenant's power to assign or sublet.
- 625. Statutes requiring the consent of the landlord to the tenant's assignment of subletting.
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- 666. The duties of a receiver as a tenant.
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- 668. The rights of a receiver in foreclosure to the rent.

**§ 624. The general rule as to tenant's power to assign or sublet.** A tenant for life or years may assign or grant his interest to another without the consent of the reversioner unless he is restrained from doing so by an express covenant in the lease or by some statutory provision. He may also, unless similarly restrained, underlet for any fewer or less number of years than he himself holds.<sup>1</sup> In Georgia and Kansas, the statement of the text does not seem to apply. In Kansas a tenant for a year cannot assign or sublet without the consent of his landlord.<sup>2</sup> In Georgia an assignee without the consent of the landlord is a mere intruder.<sup>3</sup> The assignee of the lease is entitled to be put

<sup>1</sup> Nave v. Berry, 22 Ala. 382; Crommelin v. Thiess, 31 Ala. 412, 70 Am. Dec. 499; Robinson v. Perry, 21 Ga. 183, 68 Am. Dec. 455; Martin v. Sexton, 112 Ill. App. 199; Goldsmith v. Wilson, 68 Iowa, 685, 28 N. W. Rep. 16; Jackson v. Hughes, 1 Blackf. (Ind.) 421; Pierce Cequin Co. v. Meadows (Ky. 1902), 86 S. W. Rep. 1127; Weatherbury v. Baker, 25 La. Ann. 229; Gould v. Eagle Creek, etc., 8 Minn. 427, 431; Simpson v. Moorhead, 65 N. J. Eq. 623, 56 Atl.

Rep. 887; Schenkel v. Lischinsky, 90 N. Y. Supp. 300; Eten v. Luyster, 66 N. Y. 252, 257; Roosevelt v. Hopkins, 33 N. Y. 81. Compare *contra*, Chapman v. McGrew, 20 Ill. 101; Crowe v. Riley, 63 Ohio St. 1, 57 N. E. Rep. 956; Wildey Lodge v. City of Paris (Tex. 1902), 73 S. W. Rep. 69; Rickards v. Dana, 74 Vt. 74, 52 Atl. Rep. 134.

<sup>2</sup> Gano v. Prindle, 6 Kan. App. 851, 50 Pac. Rep. 110.

<sup>3</sup> Bass v. West, 110 Ga. 698, 36 S. E. Rep. 244. An assignment of a

into possession of the premises by the lessor and to be invested with all the rights and privileges of the lessee which he possessed under his lease in other cases where the consent of the landlord is not required.<sup>4</sup> These rules are in conformity with the general principle favoring the alienation of property and are generally applicable to all leases unless the parties have agreed that an assignment must be with the landlord's consent. If the lessor desires to protect himself against an assignment by the lessee which may perhaps result in his having an unwelcome tenant introduced upon the premises, he should see to it that it is stipulated in the lease that his consent to an assignment shall be required and that an assignment without his consent operate as a forfeiture of the lease. Not only is the lease assignable by the original lessee but the subsequent tenant may assign his interest to another and by so doing rid himself of liability to pay rent to the landlord.<sup>5</sup> In the absence of an express stipulation requiring that the refusal of consent by the landlord shall not be arbitrary, he is not bound to give any reason for a refusal of his consent to an assignment. A provision in a lease that consent is not to be arbitrarily refused or withheld by the landlord is not a covenant either express or implied that the landlord would not arbitrarily refuse his consent, upon which the lessee can recover. In such circumstances an arbitrary refusal by the landlord to consent can only be a defense to an assignment without consent which the lessee may make.<sup>6</sup> A landlord who

lease was held to be prohibited by a covenant against sub-letting in a lease which expressly granted all rights under the lease to the lessee and his heirs but which made no mention of assigns. *Up-ton v. Hosmer*, 70 N. H. 493, 49 Atl. Rep. 96, 97.

<sup>4</sup> *Nave v. Berry*, 22 Ala. 382, 391.

<sup>5</sup> *Johnson v. Sherman*, 15 Cal. 287, 76 Am. Dec. 481; *Trabue v. McAdams*, 8 Bush (Ky.) 74; *Sanders v. Partridge*, 108 Mass. 556; *Durand v. Curtis*, 57 N. Y. 7; *Tibbals v. Iffland*, 10 Wash. 451, 456, 39 Pac. Rep. 102. The act of

a lessee in sub-letting to a tenant from year to year is a breach of a covenant that the lessee should not "do or suffer any act by which the demised premises, or any part of the same, should either directly, or by operation of law, or otherwise, either for the whole or for a part of the term, become vested in any other person than the lessee." *Dymock v. Showell's Brewery Co.*, 79 Law T. (N. S.) 329.

<sup>6</sup> *Trelvar v. Bigge*, 43 L. J. Ex. 95, L. R. 9 Ex. 151, 22 W. R. 843; *Sear v. House Property and Investment Society*, 50 L. J. Ch. 77,

occupies a part of the premises which is leased to a tenant who has covenanted not to assign or underlet without the consent of the landlord in writing, which is not to be unreasonably refused, may reasonably inquire before giving his consent for what purposes an assignee or undertenant intends to use the premises and he may require that the undertenant shall enter into a covenant with him against underletting or assigning similar in every respects to the covenant in the original lease.<sup>7</sup>

**§ 625. Statutes requiring the consent of the landlord to the tenant's assignment of sub-letting.** In some states statutes have been enacted by which the tenant is absolutely prohibited from assigning his term or from subletting without the consent of the landlord to be manifested in writing.<sup>8</sup> Under such statutes, the act of the tenant in assigning the lease or in subletting without the landlord's consent as required by the statute, forfeits the lease at the option of the landlord,<sup>9</sup> and the assignment or sublease is void at his election and confers no rights upon either party to it.<sup>10</sup> A statute prohibiting an assignment without the written consent of the landlord does not prevent the tenant from subletting.<sup>11</sup> In Texas after the consent required by the statute has been given by the landlord in writing either in the written lease itself or subsequently to its execution, the tenant is thereby absolutely absolved from his covenants in the lease to the landlord whether or no the assignee is solvent.<sup>12</sup> These statutes, being in derogation of the common law as well as calculated to restrain the free commerce in property are liable to be strictly construed in favor of the tenant. Where a statute

<sup>16</sup> Ch. D. 3875, 43 L. T. 531, 29 W. R. 192, 45 J. P. 204.

also Scott v. Slaughter, 35 Tex. Civ. App. 524, 80 S. W. Rep. 643.

<sup>7</sup> In re Spark's Lease, 74 Law J. Ch. 318, 1 Ch. 456, 92 Law T. 537, 53 Wkly. Rep. 376.

<sup>11</sup> Moore v. Guardian Trust Com., 173 Mo. 218, 245, 73 S. W. Rep. 143, cf. Gulf, etc. Co. v. Settegast, 79 Tex. 256.

<sup>8</sup> Rev. St. Missouri 1899, § 4107, Sayles Ann. Stat. 1897, art. 3250. See Waggoner v. Snody, 36 Tex. Civ. App. 514, 82 S. W. Rep. 355.

<sup>12</sup> Ascarete v. Pfaff (Tex. Civ. App.), 78 S. W. Rep. 974. The lessor may waive the provisions of the statute. Forrest v. Durnell, 86 Tex. 647, 23 S. W. Rep. 481; Menger v. Ward, 87 Tex. 622, 30 S. W. Rep. 853; Wildey Lodge v. City of Paris, 31 Tex. Civ. App. 632, 73 S. W. Rep. 69.

<sup>9</sup> Markowitz v. Greenwall Theatrical Circuit Co. (Tex. Civ. App.), 75 S. W. Rep. 74, 76, 317.

<sup>10</sup> Matthews v. Whitaker (Tex. Civ. App.), 23 S. W. Rep. 528. See

forbids a tenant for a term not exceeding a period therein specified, from assigning his lease, one whose term may by any possible future extension or renewal exceed the duration of the period specified, is not within its provision. Thus, where a tenant for a term not to exceed two years may not assign without the consent of his landlord, a tenant who has a lease for one year with an option of a renewal for five years may assign without the consent of the landlord.<sup>13</sup>

**§ 626. Sublease and assignment distinguished.** It is frequently of the utmost importance to ascertain whether an instrument signed by the lessee is a sublease or an assignment of his lease. Broadly speaking, the distinction is that by the assignment the lessee conveys his whole interest in the unexpired term leaving no reversion in himself.<sup>14</sup> There may be an assignment either of the whole term or a specific part of the whole term but in either case the entire interest existing at the time of the assignment must pass to the assignee.<sup>15</sup> In determining

<sup>13</sup> Jones v. Hamm, 98 Mo. App. 433, 74 S. W. Rep. 150. In Missouri every tenant for a term not exceeding two years, together with tenants at will and at difference, are prohibited from assigning or transferring any part of their term without the written assent of the lessor. Roth Tool Co. v. Champion Spring Co., 93 Mo. App. 530, 67 S. W. Rep. 967.

<sup>14</sup> Cook v. Jones, 96 Ky. 283, 17 Ky. Law Rep. 356, 28 S. W. Rep. 960; Alford v. Jones, 19 Ky. Law Rep. 356, 30 S. W. Rep. 1013; Lee v. Payne, 4 Mich. 106, 119; Craig v. Summers, 47 Minn. 189, 49 N. W. Rep. 742; Bedford v. Terhune, 30 N. Y. 453, 458, 86 Am. Dec. 394; Woodhull v. Rosenthal, 61 N. Y. 382; St. Joseph & St. L. R. Co. v. St. Louis I. M. & S. R. Co., 135 Mo. 173, 36 S. W. Rep. 602; Hollywood v. First Parish in Brockton, 192 Mass. 269, 78 N. E. Rep. 124; Mausert v. Christian Feigenspan, (N. J. Ch.), 64 Atl.

Rep. 801; Beadman v. Wilson, 38 L. J. C. P. 91, L. R. 4 C. P. 57, 19 L. T. 282, 17 W. R. 54; Burton v. Barclay, 7 Bing. 745, 5 M. & P. 785, 9 L. J. (O. S.) C. P. 231; Baker v. Gostling, 4 M. & Scott, 539, 1 Bing. (N. Y.) 19, 3 L. J. C. P. 292. While by the sub-lease he transfers a portion only of his unexpired term which portion may be any part of the term. Mayhew v. Hardesty, 8 Md. 479; Wheeler v. Hill, 16 Me. 329, 334; Lee v. Payne, 4 Mich. 106, 117, 118; McNeil v. Amos, 138 Mass 245; Schenkel v. Lischinsky, 45 Misc. Rep. 523, 90 N. Y. Supp. 300; Dunlap v. Bullard, 131 Mass. 161, 164; Doty v. Heth, 57 Miss. 530, 535; Shannon v. Grindstaff, 11 Wash. St. 536, 539, 40 Pac. Rep. 123; Fulton v. Stuart, 2 Ohio, 215, 15 Am. Dec. 542; Davis v. Morris, 36 N. Y. 567, 574; Bedford v. Terhune, 30 N. Y. 453, 458.

<sup>15</sup> Mulligan v. Hollingsworth, 99 Fed. Rep. 216.

whether an instrument is a sublease or an assignment, the formal character of the paper is not important.<sup>16</sup> If a lessee sublets for the whole unexpired term, reserving a power of re-entry, or if the undertenant covenants to surrender to the original lessee at the end of the term, it is a sublease and not an assignment.<sup>17</sup> But the transfer of a part of the premises at a different rent and for a longer period than the term of the assignor is an assignment.<sup>18</sup> An assignment of a lease, on the other hand, as distinguished from a sublease is an agreement whatever may be its form by which the lessee parts with his whole term or with such part thereof as may be unexpired. By an assignment, no reversion remains in the lessee, and any transaction by which a reversion remains in the lessee is a sublease. The courts will not permit the parties to disguise an assignment by employing language which is appropriate only to a demise but will penetrate any subterfuge which they may have employed to conceal or obscure the true nature of the transaction. If the assignment is by a deed, the mere fact that rent is reserved in the deed with a power of re-entry for non-payment of rent, or for the breach of any covenant will not alone make the instrument a sublease, where it transfers the whole unexpired portion of the term. Again the fact that an instrument which is meant to be an assignment of the lease reserves rent to the assignor at a rate which differs from that mentioned in the original lease, or that it

<sup>16</sup> *Smiley v. Van Winkle*, 6 Cal. 605; *Sexton v. Chicago Storage Co.*, 129 Ill. 318, 21 N. E. Rep. 920, 16 Am. St. Rep. 274, reversing 30 Ill. App. 95; *Craig v. Summers*, 47 Minn. 189, 193, 49 N. W. Rep. 742, 15 L. R. A. 236; *Woodhull v. Rosenthal*, 61 N. Y. 382, 391; *Bedford v. Terhune*, 30 N. Y. 453, 459, 86 Am. Dec. 394; *Stover v. Chasse*, 6 Misc. Rep. 394, 396, 26 N. Y. Supp. 740. See also *Indianapolis Mfg. & Car Union v. Cleveland C. C. & I. Ry. Co.*, 45 Ind. 281, 287. To render the assignee of a lease liable for rent to the landlord, the whole term must have been assigned. A reservation of the lessee of the last day

of the term, will prevent his liability from attaching. *Davis v. Morris*, 36 N. Y. 569, affirming 35 Barb. (N. Y.) 227.

<sup>17</sup> *People v. Robertson*, 39 Barb. (N. Y.) 9; *Martin v. O'Conner*, 43 Barb. 514; see *Woodhull v. Rosenthal*, 61 N. Y. 382; *Post v. Kearney*, 2 N. Y. 394, 1 Sand. (N. Y.) 105; *Collins v. Hasbrouck*, 56 N. Y. 157; *Ganson v. Tiffet*, 71 N. Y. 48; *Preece v. Corrie*, 2 M. & P. 57, 5 Bing. 24, 6 L. J. (O. S.) C. P. 205, 30 R. R. 536. See *Barrett v. Rolph*, 14 M. & W. 348, 14 L. J. Ex. 308.

<sup>18</sup> *Wollaston v. Hakewill*, 3 Man. & G. 297, 3 Scott (N. R.) 593, 10 L. J. C. P. 303.

contains new covenants by the assignee with the assignor which are not in the original lease, or that it provides for a surrender to the assignor at the expiration of the term does not alone make it a sublease if by it all the unexpired term is conveyed. The question often arises where a lessee transfers possession to a third party by an agreement, whether such an agreement is, in its legal effect, an assignment or merely a sublease. The question has frequently and probably most generally, arisen between the original lessee and the transferee and much confusion will be avoided, and perhaps the variant decisions to some extent, at least, harmonized, by observing the distinction between this class of cases and cases where the question has been between the transferee and the original landlord. In the latter class of cases it is very well settled that if the lessee parts with his whole term or interest as lessee, or makes a lease for a period exceeding his whole term, or the unexpired portion thereof, it will be as to his landlord an assignment of the lease. As to him and as to his rights against the transferee the fact that his lessee reserved a larger rent, or a power of entry on forfeiture or provided for a surrender, is not material, though so far as the transferee is concerned the instrument may be intended as a sublease. Where a lessee leases for the remainder of his term a building standing on a portion of the leasehold premises, and by the terms of the lease grants easements, appurtenant to the building, of light and air, and of passing and repassing, over other portions of the leasehold premises, in common with him and those claiming under him, such lease is an underlease and not an assignment of his whole term in a portion of the premises.<sup>19</sup> Where a lessee leases a portion of the premises to one person by metes and bounds for his entire term and afterwards assigns all his right, title and interest in the lease to another, the latter person is an assignee and the former an undertenant, the assignee becoming the lessor of the person to whom the underlease has been made.<sup>20</sup> In the absence of any evidence of the agreement under which certain persons entered the demised premises after their abandonment by the lessee, where it is shown that they occupied them during the whole of the unexpired term of the lease, the fair presumption is that they entered with an intention to occupy

<sup>19</sup> McNeil v. Kendall, 138 Mass. 245, 252.

<sup>20</sup> Patten v. Deshon, 1 Gray (Mass.) 325.

as assignees for such unexpired term. And where in addition to this the persons entering with the permission of the lessees had the lease in their hands, paid rent thereon to the lessor for the benefit of the lessee and there was no evidence of a holding by them in any other character, the conclusion is almost irresistible that they were assignees, and not subtenants.<sup>21</sup>

**§ 627. What constitutes an assignment or a sublease.** A covenant in a lease forbidding its assignment or under-letting by the tenant is to be strictly construed in favor of the tenant,<sup>22</sup> as by it the tenant is deprived of a right which he enjoyed at law. A stipulation forbidding the lessee to assign his term, will not be broken by any action on the part of the tenant short of an actual transfer of the whole of his legal interest in his term to a third person with a complete surrender of the possession of the premises to such person. Where the lessee is a firm a mere change in the partners which compose it, or the taking in of a new partner, is not a breach of a condition against an assignment. Nor is such conduct on the part of the lessee a subletting.<sup>23</sup> The granting of a license by the lessee, or the creation by him of an easement in the premises, in favor of a third party in subordination to his lease is not a subletting which will constitute a breach of a covenant not to sublet. The fact that the third person pays for the privilege created by the license or easement and that it is a continuing one is in no wise material. Such agreement only will be regarded as a sublease as gives the right to the possession of the land and its exclusive occupation by the sublessee for the purpose agreed upon. Hence, the creation of a license by which a stranger is permitted in return for a cash payment by him to the lessee to place a sign on the outside wall of the premises is not a sublease.<sup>24</sup> So, an agreement by which a railroad company is permitted to place tracks upon the leased premises is not a breach of a covenant not to grant an underlease, as it is only a license.<sup>25</sup> An agreement by a tenant not to assign, demise or part with the interest in the term is not broken by him granting

<sup>21</sup> Bedford v. Terhune, 30 N. Y. 453, 459, 86 Am. Dec. 394.

<sup>24</sup> Lowell v. Strahan, 145 Mass. 112, 12 N. E. Rep. 401, 1 Am. St. Rep. 422.

<sup>22</sup> Medinah Temple Co. v. Currey, 58 Ill. App. 433.

<sup>25</sup> Pence v. St. Paul M. & M. R. Co., 28 Minn. 488, 11 N. W. Rep.

<sup>23</sup> Boyd v. Fraternity Hall Ass'n, 16 Ill. App. 574; Roosevelt v. Hopkins, 33 N. Y. 81.

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a privilege and license to a third person to use refreshment rooms, bars, smoking rooms, wine cellars and offices in the premises which are a theatre. The grant of this privilege is not a lease as the tenant does not part with any portion of the premises or of any interest therein but retains full possession and control over the same.<sup>26</sup> The underletting of a part of the premises is not a breach of a covenant not to underlet the premises.<sup>27</sup> So, a covenant forbidding an assignment of the whole or any part of the term does not prevent an underlease of all the premises.<sup>28</sup> A provision that a lessee shall not lease, let or demise all or any part of the premises, nor assign, transfer or make over the same or the lease or any of the term is not broken by a mortgage, for though a mortgage in form is an assignment of the whole term, yet in theory and in practice, it is merely security for a debt leaving the legal title in the mortgagor at least until default in payment.<sup>29</sup> The same rule applies in the case of an assignment or a delivery of a lease as security for a debt. This transaction constitutes an equitable mortgage and the legal interest still remains in the lessee.<sup>29a</sup> If however as is usually the case the mortgagee has an absolute right to enter on the property or to sell the estate of the lessee in the leasehold and the occasion arises and he exercises his rights it will be such an alienation as will operate as a breach of the covenant not to assign or transfer. So it has been held that a mortgage of a

<sup>26</sup> Daly v. Edwardes, 82 L. T. 372, 48 W. R. 360, 64 J. P. 295, affirmed 83 L. T. 548. See also Edwardes v. Barrington, 85 L. T. 650, 50 W. R. 358. & R. 226; Goodbehere v. Bevan, 3 M. & S. 353; Crouse v. Mitchell, 9 Detroit Leg. N. 74, 90 N. W. Rep. 32; Farnum v. Hefner, 79 Cal. 575, 21 Pac. Rep. 955; Riggs v. Pursell, 66 N. Y. 193; Barry v. Hamburg Bremen F. I. Co., 110 N. Y. 1; Doe d. Pitt v. Hogg, 4 D. & R. 226, 1 Car. & P. 160, 2 L. J. (O. S.) K. B. 121; same case *nom. Doe d. Pitt v. Laming*, R. & M. 36, 27 R. R. 512; *In re Cocks*, 2 Deac. 14; *Ex parte*, Drake 1 Mont. D. & D. 539; M'Kay v. M'Nally, 4 L. R. Ir. 438; Bowser v. Colby, 1 Hare, 109, 11 L. J. Ch. 132, 5 Jur. 1106.

<sup>27</sup> Noble v. Becker, 3 Brewster (Pa.) 550; Church v. Brown, 15 Ves. 265; Grore v. Portal, 71 L. J. Ch. 299, (1902) 1 Ch. 727, 86 L. T. 350.

<sup>28</sup> Crusoe v. Bugby, 2 Wm. Bl. 766; Grore v. Portal, 71 L. J. Ch. 299, (1902) 1 Ch. 727, 86 L. T. 350.

<sup>29</sup> West Shore Co. v. Wenner, 70 N. J. L. 230, 57 Atl. Rep. 408, 409, affirmed in 71 N. J. L. 682, 60 Atl. Rep. 1134; Carson v. J. C. Ins. Co., 43 N. J. Law 300, 39 Am. Rep. 584; Pitt v. Hogg, 4 Dowl.

<sup>29a</sup> Dunlop v. Mulry, 85 App. Div. 498, 500, 83 N. Y. Supp. 477; Riggs v. Pursell, 66 N. Y. 193.

lease with a subsequent foreclosure and sale of the term is such a transfer by the lessee as will constitute a breach on his part of a covenant not to transfer the lease.<sup>30</sup> It has been generally held that the giving of an under lease by a lessee is not a breach of his covenant not to assign the lease.<sup>31</sup> For the distinction which is elsewhere pointed out between an under lease and an assignment is very clear. By the assignment the tenant parts with his entire interest and a new tenant takes his place with whom the landlord must deal as with his predecessor. In the case of a sublease the landlord enters into no new relations with any person. He can still look to his lessee to perform all the duties of a tenant to him. Hence inasmuch as a sublease can never have the effect of an assignment it will not constitute a breach of a contract not to assign. On the other hand it has been held that a covenant against underletting does not preclude the lessee from assigning his interest in the term. In the absence of any covenant against assigning he would at common law have an absolute right to assign. And the rule that covenants are to be construed strictly in favor of the tenant will prompt the court not to extend the operation of the covenant not to underlet to prevent the tenant from doing what he has otherwise the right to do unless he is expressly restrained from doing it.<sup>32</sup> The act of partners in a firm forming a corporation with other persons to which are turned over all the assets of the former firm including a lease of real estate, and all rights and privileges enjoyed under, is a breach of a covenant against assignment.<sup>33</sup> If the partners instead of forming a corporation had admitted new members into the firm and transferred to the partners their interest it would have been an assignment of the lease

<sup>30</sup> West Shore R. Co. v. Wenner, 71 N. J. Law, 682, 60 Atl. Rep. 1134, affirming 70 N. J. L. 230, 57 Atl. Rep. 408, *contra*.

<sup>31</sup> Field v. Mills, 33 N. J. Law, 254-256; Den *ex dem.* Bockover v. Post, 25 N. J. Law, 285, 291; Hargrave v. King, 40 N. Car. 430; Crusoe v. Bugbee, 2 W. Bl. 766, 3 Wilson, 234; Jackson v. Silver-nail, 15 Johns. (N. Y.) 278; Weldon v. Harrison, 17 Johns. (N. Y.)

66; Keteltas v. Coleman, 2 E. D. Smith (N. Y.) 408, 11 N. Y. Leg. Obs. 151; Post v. Kearney, 2 N. Y. 394, 1 Sand. (N. Y.) 105.

<sup>32</sup> Field v. Mills 33 N. J. Law, 254, 256; Lynde v. Hough, 27 Barb. (N. Y.) 415, 423; Eastern Tel. Co. v. Dent, 78 Law T. (N. S.) 713.

<sup>33</sup> Emery v. Hill, 67 N. H. 330, 39 Atl. Rep. 266.

or interest therein.<sup>34</sup> So the act of a tenant who without the consent of the landlord agrees to enter into a partnership with a third person and that such person should have the exclusive use of a certain portion of the demised premises of which he takes possession is a breach of a condition against subletting the premises without the written consent of the landlord.<sup>35</sup> A lease made by the original lessor and a sublease made by his lessee may be construed together in order to ascertain the meaning of the words employed in the sublease. In order that this may be done it must appear that is was the intention of the parties to the sublease that the instrument should be construed together and the best and in fact the conclusive evidence of such an intention on their part is a reference in the sublease to the lease by which reference the former instrument will be presumed to incorporate the latter within it.<sup>36</sup> Neither the bequest by a tenant of his in-

<sup>34</sup> Varley v. Coppard, L. R. 7 C. P. 505.

<sup>35</sup> Roe d. Dingley v. Sales, 1 M. & S. 297. "In may respects an under<sup>1</sup> lease is more unfavorable to the owner of land than an assignment. An under tenant taking possession does not put himself in privity of estate with the original lessor, nor is he liable to him for the performance of the covenants running with the land, such as the covenant to pay rent or to keep the premises in repair. An assignee of the lease, on the contrary, can claim no such disconnection or exemption. Is it then so improbable that a landlord may be willing to permit an assignment, and yet might be opposed to an undertenancy? That he might say to his tenant: "you may turn over your whole interest because the assignee will, in point of estate, be in privity with me and will be compelled to perform the most important covenants in the lease, but I cannot consent to receive an under tenant who will be a stranger to my title and

whom I can hold to no responsibility." Field v. Mills, 33 N. J. Law, 254, 259.

<sup>36</sup> Illinois Starch Co. v. Ottawa Hydraulic Co., 125 Ill. 237, 241, 17 N. E. Rep. 486, affirming 23 Ill. App. 272. A tenant at will having no assignable interest in the term, one to whom he conveys possession cannot be regarded, so far as the original lessor is concerned, as an assignee. He may be a trespasser or a tenant at sufferance so far as the first lessor is concerned, but as to the tenant at will he is at most an undertenant. Austin v. Thomson, 45 N. H. 113, 121. A lease of a part only of the premises though for the whole term is a sub-lease and not an assignment of a lease. Austin v. Thomson, 45 N. H. 113; Fueton v. Stewart, 2 Ohio, 215, 15 Am. Dec. 542; Shannon v. Grindstaff, 11 Wash. St. 536, 40 Pac. Rep. 123. But a person who is in possession of a house upon demised premises as an employee of the tenant is not a sub-tenant nor will his possession as such,

terest in a term under a lease, nor its subsequent transfer by his executors to themselves as trustees under the will, is a breach of a covenant not to assign or transfer. This construction is enforced by the fact that the lease contains a provision that it shall go to the personal representatives of the lessee, and that all covenants shall bind the lessee or others having his estate in the premises. Doubtless the same construction would be received though the latter provisions were absent from the lease for a devolution of the lease upon the personal representative of the lessee can with no justice or sense be said to be an assignment as that word is usually understood but rather a change of ownership brought about by operation of law and which is inevitable in the case of the death of either party to the lease.<sup>37</sup>

**§ 628. Whether a prohibition of an assignment or a subletting is a condition or a covenant.** The determination of this question depends upon the particular language used in the lease. The tendency is to regard such prohibitions as conditions rather than as covenants, and it is only by this construction that the full intention of the parties will usually be carried out.<sup>38</sup> If, however, from the language of the lease it is appar-

constitute a breach of a covenant not to sub-let, without the consent of the landlord. *Vincent v. Crane*, 10 Det. Leg. N. 653, 97 N. W. Rep. 34. A person who is recognized by both landlord and tenant as a sub-tenant by an oral agreement and who receives the benefit of such agreement, is estopped subsequently to deny this fact. Though the agreement is oral, he will be bound by the covenants of the original lease. *American Cent. Ins. Co. v. Chicago & A. Ry. Co.*, 74 Mo. App. 89.

<sup>37</sup> *Squire v. Learnard* (Mass. 1907), 81 N. E. Rep. 880. Some early decisions and dicta hold that a bequest of a term by the tenant to some one other than his executor is an assignment. *Parry v. Harbett, Dyer*, 45b; *Barry v. Stanton*. Cro. Eliz. 331; S. C. sub

*nom. Taunton v. Barrey*, Paph. 106; *Knight v. Mory*, Cro. Eliz. 60; *Dumper v. Syms*, Cro. Eliz. 816. Others hold that a devise of a term is not an assignment and say this has been the law for many years. *Fox v. Swan, Styles* 483; *Crusoe v. Bugby*, 3 Wils. 234, 237; *Doe v. Bevan*, 3 M. & S. 353, 361. It is admitted that the transfer of the term to the administrator of the lessee by the lessee dying intestate is not an assignment of the term for there is here no voluntary act of the lessee transferring his interest. *Squire v. Learnard* (Mass. 1907), 81 N. E. Kep. 880; *Weil v. Raymond*, 142 Mass. 206, 7 N. E. Rep. 860; *Smith v. Putnam*, 3 Pick. (Mass.) 221; *Bemis v. Wilder*, 100 Mass. 446.

<sup>38</sup> *Machinery Co. v. Flower*, 12

ent that the prohibition against subletting or assigning is a covenant and not a condition, the breach of it by the lessee does not operate as a forfeiture, nor give him the power to render a sublease made in violation of the covenant not to sublet, invalid. It is therefore valid and the sublessee cannot recover against his lessor for false representations by the latter, that he had a right to sublet.<sup>39</sup> The possession of the assignee or subtenant is a lawful possession where the stipulation against assignment or subletting is a covenant and not a condition. Such being the case, the landlord's remedy is on the covenant against his lessee and the assignee or subtenant may defend his possession against the original lessor and maintain trespass or ejectment against a stranger.<sup>40</sup> An agreement by a lessee that he will not assign or underlet without the written assent of the lessor if it is followed by a provision that if default should be made in any of the covenants the lessor shall have the right to declare the term ended and to re-enter is not a mere covenant but has the force of a condition.<sup>41</sup> Where such language is used there can be no doubt as to what the parties intended and, inasmuch as the intention must always prevail, the rule that courts incline to construe such agreements as covenants rather than as conditions will be disregarded. In fact, it is only by putting the prohibition in the form of a condition subsequent that the lessor can secure its enforcement in a satisfactory manner. For if the lessor shall have no right of forfeiture and re-entry, the prohibition does not prevent him from having an objectionable person forced upon him or one whom he does not for some particular reason desire to occupy the property. The lessor has an absolute right by a proper condition to protect himself from a reckless and irresponsible person whom his lessee by an assignment may endeavor to thrust upon him.

Detroit Leg. N. 214, 103 N. W. Rep. 873. For cases in which a prohibition of assigning has been regarded as a covenant and not as a condition. See *Doe v. Godwin*, 4 M. & S. 265; *Crawley v. Price*, L. R. 10 Q. B. 302; *Shaw v. Coffin*, 14 C. B. (N. S.) 372, where the covenant read the tenant agrees he will not underlet

the premises without the consent of the landlord.

<sup>39</sup> *In re Pennewell*, 119 Fed. Rep. 139.

<sup>40</sup> *Hague v. Aherns*, 3 U. S. App. 231, 53 Fed. Rep. 58, 3 C. C. A. 426.

<sup>41</sup> *Kew v. Trainor*, 150 Ill. 150, 155, 37 N. E. Rep. 223, affirming 50 Ill. App. 629.

**§ 629. The form of the consent of the lessor to an assignment or underletting.** Where the lease prohibits a subletting a valid sublease cannot be made without the lessor's consent, if by the terms of the original lease the subletting constitutes a breach of a condition.<sup>42</sup> The consent of the lessor when required may be given by his agent who is authorized to do so, and the consent of the general agent of the lessor who has charge of the leasing of the lessor's property, would presumptively be a sufficient consent and binding on the lessor. Where, by the terms of the lease itself, the consent of the lessor, which is a corporation, is to be given by its superintendent a written consent given by the superintendent of the corporation appointed by a receiver of it, is sufficient.<sup>43</sup> The consent when it is necessary to be in writing, may be endorsed upon the lease itself. A consideration is not necessary to be expressed in it. If the lease provides that the consent to sublet shall be expressed in writing on the back of the lease, the absence of such endorsement is *prima facie* evidence that no consent was given.<sup>44</sup> A letter from the lessor to the lessee consenting that a person to whom the lessee had sold out his stock and business should take the farm "on the same conditions and in accordance with the lease," is a proper written consent to an assignment though an assignment of the term was never executed to the purchaser who entered into possession.<sup>45</sup> If written consent is not absolutely required by the lease an oral consent to an assignment or a subletting will be sufficient. So, also the lessor's consent may be inferred from his conduct or from his silence when it is his duty to speak. Thus, his consent may be inferred from the fact that a person other than the lessee himself, is upon the premises.<sup>46</sup> The silence of the lessor under circumstances where it was his duty to speak may be a consent. The delay or failure of the land-

<sup>42</sup> Meyer v. Rothschild, 46 La. Ann. 1174, 15 So. Rep. 383.

<sup>43</sup> Elevator Case, 17 Fed. Rep. 20, 3 McCrary C. C. 463.

<sup>44</sup> Berryhill v. Healey, 89 Minn. 444, 95 N. W. Rep. 314.

<sup>45</sup> West v. Dobb, 10 B. & S. 987, 39 L. J. Q. B. 190, L. R. 5 Q. B. 460, 23 L. T. 76, 18 W. R. 1167.

<sup>46</sup> A parol license to underlet

may not be sufficient where a consent in writing is required. If a parol consent is given as a snare to the tenant and under circumstances of fraud, equity will relieve from a forfeiture. Richardson v. Evans, 3 Madd. 218, arising from the absence of a consent in writing.

lord promptly to object to his tenant selling out his business, to one who agrees to pay the subsequent rent, is an assent to an assignment. It is also an acceptance of a surrender of the term.<sup>47</sup> Assent may be inferred from the fact that the lessor has charged rent to a person other than the tenant and collected rent from him during his occupation.<sup>48</sup> The lessor's assent to an assignment is a sufficient consideration to support covenants entered into by the assignee.<sup>49</sup> Where an assignment is invalid without the consent of the lessor the giving of security for rent by an assignee of a lease, the payment by him of rent due and the fact that a particular business was to be carried on in the premises by the lessee constitute a sufficient consideration for an agreement by the landlord to permit an assignment.<sup>50</sup> The consent of the landlord given to a subtenant expressly waiving a sublease of any portion of the premises to a reputable tenant carrying on a business which would not affect the premises and also providing that no part of the premises should be sublet as a saloon, permits the use of a portion of the premises for a garage by a subtenant. The fact that the insurance rates would thereby be increased as regards the other tenants is not material.<sup>51</sup> If the agreement to assign a lease is defeated because the lessor refuses to consent to the assignment, the money deposited on a contract for the assignment of a lease which is subject to the condition that the landlord consents to the assignment may be recovered as money had and received.<sup>52</sup>

**§ 630. A Waiver of a breach not to assign.** An assignment by a lessee without the consent of the lessor, if required by the lease is not absolutely void but voidable at the election of the

<sup>47</sup> *Brayton v. Boomer*, 131 Iowa, 28, 107 N. W. Rep. 1099; *Benson v. Suarez*, 43 Barb. (N. Y.) 408, 410, 19 Abb. Pr. Rep. 61, 28 How. Pr. Rep. 51; see *Elphinstone v. Iron & Coal Co.*, 11 App. Cas. 332.

<sup>48</sup> *Randol v. Tatum*, 98 Cal. 390, 33 Pac. Rep. 433; *Colton v. Gorham*, 72 Iowa, 324, 326, 33 N. W. Rep. 76; *O'Keefe v. Kennedy*, 3 Cush. (Mass.) 325; *Porter v. Merrill*, 124 Mass. 534; *Heetor v. Eckstein*, 50 How. Pr. (N. Y.) 445; *Lodge v. White*, 30 Ohio St.

569, 574, 27 Am. Rep. 492. The consent of a lessor to an assignment given in writing need not be under seal. *Stillman v. Harvey*, 47 Conn. 26.

<sup>49</sup> *Lindsley v. Schnaider Brewing Co.*, 59 Mo. App. 271.

<sup>50</sup> *Jones v. Daly*, 73 App. Div. 220, 76 N. Y. Supp. 725.

<sup>51</sup> *Dodd v. Ozburn* (Ga. 1907), 57 S. E. Rep. 701.

<sup>52</sup> *Wright v. Newton*, 2 C. M & R. 124, 1 Gale, 67, 5 Tyr. 736.

lessor.<sup>53</sup> There is no forfeiture without a re-entry by the landlord, and an allegation or proof that the lessors did not consent is not sufficient to show that the lease was forfeited.<sup>54</sup> The lessor or his successors in interest, being the only persons who may legally take advantage of a breach of a condition not to assign or not to sublet, without the written consent of the lessor or owner may waive the breach, by their conduct subsequent to the breach. Upon the breach of the condition the lessor or his grantee may elect whether to enforce the forfeiture which results therefrom or not, and if he decides to enforce his rights to re-enter he must do so promptly or he must at least take prompt measures with that purpose in view.<sup>55</sup> If he shall neglect to act promptly in this respect and particularly if he shall, with a knowledge of the assignment by his lessee accept rent from an assignee to whose presence upon the premises he had given no written consent, he will be conclusively held to have waived any objection he may have been entitled to make and he will be presumed to have accepted the assignee as his tenant.<sup>56</sup> On the other hand it has been held that the acceptance of rent by the lessor with knowledge that a mortgage of the term had been made by his lessee, but without the knowledge that it had been foreclosed does not constitute a waiver of the forfeiture.<sup>57</sup> As to

<sup>53</sup> Chautauqua Assembly v. Aliling, 45 Hun, 582; Dierig v. Callahan, 70 N. Y. Supp. 210.

<sup>54</sup> S. Liebman's Sons Brewing Co. v. Lauter, 76 N. Y. Supp. 748.

<sup>55</sup> Murray v. Harway, 56 N. Y. 337, 342; Amsley v. Woodward, 6 B. & C. 579.

<sup>56</sup> Randol v. Tatum, 98 Cal. 390, 33 Pac. Rep. 433; Sexton v. Chicago Storage Co., 129 Ill. 318, 21 N. E. Rep. 920; Colton v. Gorham, 72 Iowa, 324, 325, 33 N. W. Rep. 76; O'Keefe v. Kennedy 3 Cush. (Mass.) 325; Porter v. Merrill, 124 Mass. 534; Heeter v. Eckstein, 50 How. Pr. (N. Y.) Rep. 445; Tyler's Estate v. Giesler, 74 Mo. App. 543; B. Roth Tool Co. v. Champion Spring Co. (Mo. App. 1902), 67 S. W. Rep. 967; Hynes v. Ecker,

34 Mo. App. 650; Amer. Ins. Co. v. Ry. Co., 74 Mo. App. 89; Murray v. Harway, 56 N. Y. 337, 342; Clark v. Greenfield, 34 N. Y. Supp. 1, 13 Misc. Rep. 124; Garcewich v. Woods, 73 N. Y. Supp. 154, 36 Misc. Rep. 201; Wildey Lodge No. 21, I. O. O. F. v. City of Paris, 31 Tex. Civ. App. 632, 73 S. W. Rep. 69; Deaton v. Taylor, 90 Va. 219, 225, 17 S. E. Rep. 944; Adams v. Shirk, 117 Fed. Rep. 801; Warner v. Cochrane, 128 Fed. Rep. 553, 63 C. C. A. 207; Walrond v. Hawkins, 44 L. J. C. P. 116, L. R. 10 C. P. 342, 32 L. T. 119.

<sup>57</sup> West Shore R. Co. v. Wenner, 70 N. J. L. 233, 57 Atl. Rep. 408, affirmed in West Shore Rd. Co. v. Wenner, 60 Atl. Rep. 1134, 71 N. J. Law 682, and also com-

the effect of a waiver by the lessor of a breach of the covenant not to assign, it is generally held that the waiver of a covenant against assignment without the consent of the lessor or the giving of such consent forever discharges and removes the restriction and the term is thereafter assignable by the assignee without the consent of the lessor. The condition against assignment is regarded as entire and not capable of being waived or released in part. This result applies whether the consent was given to assign to any one in general, whether it was given to assign to a particular person.<sup>58</sup> In a case where an assent in writing is required by the lease a court of equity would regard the breach of condition as forever waived by the action of the lessor in permitting an assignee who has entered in good faith to remain in possession and in receiving rent from him.<sup>59</sup>

pare *Meath v. Watson*, 76 Ill. App. 516, where the receipt of rent from the sub-lessee, was not regarded as a waiver. In *Indianapolis Mfg. Co. & Carpenters' Union v. Cleveland C. C. & I. Ry. Co.*, 45 Ind. 281, 287, it was held that an agent whose sole duty it was to collect rent could not waive a breach of the covenant to assign.

<sup>58</sup> *Chipman v. Emeric*, 5 Cal. 49, 63 Am. Dec. 80; *Pennock v. Lyons*, 118 Mass. 92; *Sieffke v. Koch*, 31 How. Pr. (N. Y.) 383, 384; *Dakin v. Williams*, 21 Wend. (N. Y.) 457; *Murray v. Harvey*, 56 N. Y. 337, 342; *Dougherty v. Matthews*, 35 Mo. 520, 88 Am. Dec. 126.

<sup>59</sup> A protest by the lessor accompanying the receipt by him of rent from the assignee to the effect that he does not intend to waive his rights, does not necessarily save his right to enforce a forfeiture. *Gulf C. & S. F. Ry. Co. v. Settegast*, 79 Tex. 256, 15 S. W. Rep. 228. "A covenant not to assign or under-let the leased premises, without the assent of the lessor, is frequently inserted in the lease, and is regarded as a fair

and reasonable covenant. But a license once given, removes the restriction forever, as the condition is treated as one, and therefore not capable of being waived or released as to part; but in order to have that effect, it must be such a license as is contemplated in the lease, that is, if the lease provides that the license shall be in writing, an oral license is not good. It is not to be understood, however, that this written stipulation not to sublet, unless by consent of the lessor in writing may not be waived by an oral agreement, and such is not the contention of the counsel for the complainants here. The agreement to waive the condition as to Sprague, however, was not a waiver of the condition in the lease, as to other parties, or for the carrying on of other business not contemplated by the lease or the business to be carried on by Sprague. The consent that Sprague might enter and conduct the business, of selling small musical instruments or sheet music was a restrictive waiver of the condition, and apply

§ 631. **The effect of an assignment by the lessee for the benefit of creditors.** The fact that the lessee makes an assignment for the benefit of his creditors does not terminate the lease. If, however, there is a covenant or condition in the lease that it shall terminate on the bankruptcy or insolvency of the lessee an assignment by him for the benefit of his creditors would bring about a forfeiture of the lease and the lessor would then have the right to recover the premises by ejectment or some other proper action.<sup>60</sup> A general assignment for the benefit of his creditors by a lessee of all his property real and personal, will include his interest in the lease subject to the acceptance by the assignee.<sup>61</sup> It does not follow however that the assignee at once steps into the shoes of the lessee by the assignment and without any action on his part becomes a lessee. An assignment by the lessee of all his property for the benefit of his creditors does not *ipso facto* make the assignee of the tenant a tenant of the landlord, or render him liable for the rent under the lease, unless he shall accept the lease.<sup>62</sup> In the case of an assignment for the benefit of creditors, especially where the estate assigned is to be administered by the assignee under the order and direc-

only to Sprague, and the business to be carried on by him. It gave Michell no right to lease to any other party or to carry on a different business and Sprague certainly could gain no greater rights than Michell had. The terms of the lease were not waived, but a license given to Sprague to enter and carry on that particular business, Michell to be holden for the rent. Sprague had no right to sublet and Michell no right to sublet to any one, but Sprague for that particular business." *Weithemier v. Circuit Court*, 83 Mich. 5, on page 61.

<sup>60</sup> *Reynolds v. Fuller*, 64 Ill. App. 134.

<sup>61</sup> *Smith v. Ingram*, 90 Ala. 529, 8 So. Rep. 144; *Smith v. Goodman*, 149 Ill. 75, 36 N. E. Rep. 621; *Horwitz v. Davis*, 16 Md. 313; *Main v. Green*, 32 Barb. (N. Y.) 253;

*Crouse v. Frothingham*, 97 N. Y. 105.

<sup>62</sup> *Rand v. Francis*, 67 Ill. App. 225, 48 N. E. Rep. 159, 168 Ill. 444; *Smith v. Goodman*, 149 Ill. 75, 36 N. E. Rep. 621; *Horwitz v. Davis*, 16 Md. 313, 317; *Boyce v. Bakeswell*, 37 Mo. 492; *Cameron v. Nash*, 41 App. Div. 532, 58 N. Y. Supp. 643; *Carter v. Hammett*, 12 Barb. (N. Y.) 253; *Bagley v. Freeman*, 1 Hilton (N. Y.) 196; *Journeay v. Brackley*, 1 id. 447; *Mead v. Madden*, 85 App. Div. 10, 12; *Jermain v. Pattison*, 46 Barb. (N. Y.) 9, 12; *Smith v. Wagner*, 9 Misc. Rep. 122, 123; *Draper v. Salisbury*, 11 Misc. Rep. 573; *Myers v. Hunt*, 8 N. Y. St. Rep. 338; *H. L. Judd & Co. v. Bennett*, 59 N. Y. Supp. 624, 28 Misc. Rep. 558; *Wilder v. Beed*, 4 Ohio N. P. 440; *Pratt v. Levan*, 1 Miles (Pa.) 358.

tion of the court, the acceptance of the deed by the assignee is only to be regarded as an acceptance of the trust upon which the property is assigned. The assignee occupies his position of trust, not for his own benefit but as representing the creditors of his assignor. This is the view with which a court of equity will regard him when, at the conclusion of his administration of the trust, he shall file his report and ask for his discharge. The reason he is invested with title to the debtor's property and claims is that they may be collected and turned into cash so that his debts may be paid with as little loss as possible and his creditors may be satisfied in fairness and equity. A leasehold which may be comprised in the estate might be so burdened with obligations and conditions that it would be wholly valueless for the purpose of the trust which is to pay the debts of the lessee. For this reason it has been uniformly held that an assignee for the benefit of creditors may accept the trust and enter upon the active performance of his duties, without by implication becoming an assignee of a leasehold owned by his assignor, unless he shall elect to do so. He is also entitled to have a reasonable time in which to ascertain whether or not the leasehold estate can be made available for the benefit of the creditors.<sup>63</sup> No general rule can be stated which will define what acts by the assignee will constitute an election to accept the lease. Broadly speaking, it may be said that there is no acceptance by him of the lease unless either it be shown that he has accepted in express terms or has done so by clear and unequivocal conduct, absolutely inconsistent with a right of entry or possession by the landlord.<sup>64</sup> An assignee for the benefit of creditors, who enters in the middle of a current quarter, and occupies until the rent becomes due, is liable for the whole quarter's rent.<sup>65</sup> But his entry on the premises merely to take

<sup>63</sup> Dorrance v. Jones, 27 Ala. 633; Horwitz v. David, 16 Md. 313, 317; Martin v. Black, 9 Paige (N. Y.) 644; Smith v. Goodman, 149 Ill. 75, 36 N. E. Rep. 621, 622; Wadlow v. Markey, 95 Ill. App. 484; Hanson v. Stevenson, 1 Barn. & Ald. 305; Goodwin v. Noble, 8 El. & Bl. 587.

<sup>64</sup> Smith v. Goodman, 149 Ill.

75, 36 N. E. Rep. 621, 622; H. L. Judd & Co. v. Bennett, 59 N. Y. Supp. 624, 28 Misc. Rep. 558, as to possession by the assignee; Mead v. Madden, 85 App. Div. 10, 82 N. Y. Supp. 900.

<sup>65</sup> Young v. Peyser, 3 Bos. (N. Y.) 308; Astor v. Lent, 6 Bos. (N. Y.) 612; Morton v. Pinckney, 8 Bos. (N. Y.) 135.

the possession of assigned goods made without his knowledge of the existence of a lease, does not make him liable as an assignee.<sup>66</sup> But the fact that he remains until the end of the term and collects rent from the subtenants, is a strong circumstance to show that he means to be liable for the rent.<sup>67</sup> If the assignee for the benefit of creditors accepts the lease he becomes responsible for the rent to the lessor. His mere possession of the premises for a comparatively brief time for the purpose of disposing of merchandise contained in them which constituted a large part of the estate, is not alone sufficient to show that he has accepted the term.<sup>68</sup> But where the assignee took possession of the demised premises and used them for the storage and sale of goods it may reasonably be presumed he accepted the lease and the estate will be liable though on several occasions he said he would not accept the lease.<sup>69</sup> If he does not adopt the terms of the lease, he is chargeable pro rata for the time he occupies the premises.<sup>70</sup> Where a receiver promptly repudiates all liability for rent under the lease, except for the period of time during which the premises were actually in his possession, he cannot be said to assume the lease. He is liable only for a reasonable rent during his occupancy. The fact that the landlord notifies him to pay the rent reserved on the lease or move does not affect his liability.<sup>71</sup> If the assignee surrenders the lease, he is

<sup>66</sup> Lewis v. Burr, 8 Bos. (N. Y.) 140; Dennistoun v. Hubbel, 10 Bos. (N. Y.) 155; Bagley v. Freeman, 1 Hilt. (N. Y.) 196.

<sup>67</sup> Jones v. Hausmann, 10 Bos. (N. Y.) 168.

<sup>68</sup> In re, Weinmann's Estate, 30 Atl. Rep. 389, 164 Pa. St. 405, 35 W. N. C. 321. In New York where an assignee for the benefit of creditors remains in possession, the court cannot on the summary application of the landlord prior to an accounting require the assignee to pay rent for the time of his occupancy, but the claim of the lessee must be enforced either by action or upon the proceeding for an accounting by the assignee. In re

Devlin & Co., 48 N. Y. Supp. 950, 24 App. Div. 219.

<sup>69</sup> Draper v. Salisbury, 32 N. Y. Supp. 757, 11 Misc. Rep. 573.

<sup>70</sup> Stoepel v. Union Trust Co., 121 Mich. 282, 80 N. W. Rep. 13, citing Bell v. American Protective League, 163 Mass. 558, 40 N. E. 857, 28 L. R. A. 452, 47 Am. St. Rep. 481.

<sup>71</sup> Commercial Bank of Port Huron v. Gates, 121 Mich. 282, 80 N. W. Rep. 13; S. C. Stoepel v. Union Trust Co. 121 Mich. 282, citing Bell v. American Protective League, 163 Mass. 558, 40 N. E. Rep. 857, 28 L. R. A. 452, 47 Am. St. Rep. 481. The assignee has a reasonable time to determine

not thereafter bound by any of its covenants.<sup>72</sup> But if he takes possession under the lease which was binding on his assignor and continues in possession with knowledge of the terms of the lease, he must pay rent according to its terms. An assignee for the benefit of creditors who has become responsible for the rent thereon to the lessor cannot escape that responsibility by abandoning the premises without a surrender and acceptance by the lessor or a transfer or restoration to his assignor.<sup>73</sup> An assignee for the benefit of creditors who accepts a lease under which his assignor was a lessee is responsible, while he holds it as a part of the estate, in his representative capacity on all its covenants. He is not responsible individually as he would be if he becomes a tenant in his administrative capacity by making a new lease. In the former case the assignee makes no contract and his liability is merely the liability of his assignor, while in the latter case he by his making a lease in his administrative capacity enters into contractual relations which bind him individually as well as they bind the estate and may be enforced against the assignee personally.<sup>74</sup>

**§ 632. Covenant not to assign except to a person of responsibility and respectability.** A covenant in a lease not to assign without the consent of the landlord, but that his consent shall not be unreasonably refused or refused to a person of responsibility and respectability, is valid and usual in leases in England. The discretion of the landlord is not absolute in determining whether the proposed assignee is such a person as the lease prescribes. Whether one is responsible and respectable depends upon all the circumstances of the case and the court in determining the character of the person, where the landlord refuses consent, will take these facts and circumstances in con-

whether he will assume a lease. What shall constitute a reasonable time depends upon the circumstances. Six days, one of which is a Sunday, is not a reasonable time for such a determination by the assignee. *H. L. Judd & Co. v. Bennett*, 59 N. Y. Supp. 624, 28 Misc. Rep. 558.

<sup>72</sup> *New Hampshire Trust Co. v.*

*Taggart*, 68 N. H. 557, 44 Atl. Rep. 751.

<sup>73</sup> *Thomas v. Meader*, 6 Ohio N. P. 242.

<sup>74</sup> *Man v. Katz*, 40 Misc. Rep. 645, 646, 83 N. Y. Supp. 94; *Walton v. Stafford*, 162 N. Y. 563, 57 N. E. Rep. 92, affirming 14 App. Div. 312, 43 N. Y. Supp. 1049, 4 Ann. Cases, 114, overruling 11 Misc. Rep. 573.

sideration. The landlord has no right to refuse to consent to an assignment of the lease to a proper person because he is desirous of obtaining possession of the premises and is willing to give the same amount for the lease as the proposed assignee.<sup>75</sup> The person to whom the lessee proposes to assign must be solvent or the landlord will not be compelled to accept him as a tenant. And the uses to which the premises are adapted and for which they have been used by the lessee should be considered. Thus the owner of an iron furnace and mill and water rights appurtenant thereto, may reject a corporation which is about to take an assignment of the lease where it appears that the corporation is not taking the assignment with an intent to operate them as such, the corporation not being a person of responsibility and respectability under the covenant.<sup>76</sup> As a general rule however, where a lease is not to be assigned without the consent of the landlord which is not to be withheld from an assignment to a respectable and responsible person, it is unnecessary to the validity of such an assignment to show if the assignee was in fact a person of that character that the consent was given.<sup>77</sup> A condition that a lease shall not be assigned without the consent in writing of the lessor, but "such consent not to be unreasonably withheld," is not broken by the lessee assigning without asking consent to a person in respect of whom the landlord's consent if asked for, could not have been reasonably withheld.<sup>78</sup> So where a consent was actually asked for by a tenant in the case of an assignment without consent to a person to whom no reasonable objection could be made, it was held that the refusal to consent was unreasonable and that the lessee could properly assign without it, where the lease expressly provided that "consent should not be arbitrarily withheld."<sup>79</sup>

<sup>75</sup> Bates v. Donaldson (1896), 2 Q. B. 241, 65 L. J. Q. B. 578, 74 L. T. 751, 44 W. R. 659, 60 J. P. 596.

<sup>76</sup> Harrison v. Barrow-in-Furness, 63 Law T. 834. See also Rector v. Hartford Deposit Co., 190 Ill. 380, 60 N. E. Rep. 528, affirming Hartford Deposit Co. v. Rector, 92 Ill. App. 175, in which a clause "that the provisions of the lease may be modified so that

lessee might assign the lease to any reputable person or corporation" is construed.

<sup>77</sup> Hyde v. Warden, 47 L. J. Ex. 121, 3 Ex. D. 72, 37 L. T. 567, 26 W. R. 201; Burford v. Unwin, 1 Cab. & E. 494.

<sup>78</sup> Eastern Telegraph Company v. Dent, 68 L. J. Q. B. 564, (1899) 1 Q. B. 835, 80 L. T. 459.

<sup>79</sup> Trebar v. Bigge, L. Rep. 9 Ex. 151.

Hence it may be laid down as a general proposition of law that if it is provided that a consent to an assignment is not to be unreasonably or arbitrarily withheld or refused, it is immaterial whether the tenant asks consent or not if the assignee is a proper person. In other words, the court will hold that consent was arbitrarily refused if the assignee is a suitable person though the tenant shall admit he never asked consent.

✓ § 633. **The effect of an involuntary assignment.** Inasmuch as the main purpose of a prohibition of the assignment of the term by the lessee is to prevent the landlord from having thrust upon him an insolvent or otherwise objectionable person as a tenant by the voluntary action of the lessee, it has been generally held that a covenant forbidding an assignment of his interest by the lessee without the consent of the lessor, does not apply to a transfer of the term by operation of law. Thus for example a foreclosure sale of a lease,<sup>80</sup> or the sale of the term under an execution on a judgment against the lessee and its transfer to a stranger is not a breach of condition against assignment.<sup>81</sup> In England the fact that a receiving order is made against a debtor and that he is adjudicated bankrupt, even though it be in both cases, on his own petition, does not constitute in either case a breach of a covenant not to assign leasehold property.<sup>82</sup> So an assignment by the lessee for the benefit of his creditors does not work a forfeiture of the lease.<sup>83</sup> But a provision that the alienation of the lease by a sale under an execution against the lessee shall invalidate the lease and constitute a forfeiture is valid.<sup>84</sup> A general assign-

<sup>80</sup> Dunlap v. Mulry, 85 App. Div. 498, 83 N. Y. Supp. 477.

<sup>81</sup> Farnum v. Hefner, 79 Cal. 575, 21 Pac. Rep. 955, 957, 12 Am. St. Rep. 174; Medinah Temple Co. v. Currey, 58 Ill. App. 433; Bemis v. Wilder, 100 Mass. 446; Riggs v. Pursell, 66 N. Y. 198; Jackson v. Silvernail, 15 Johns. (N. Y.) 277; In re Bush, 126 Fed. Rep. 878; Seers v. Hind, 1 Ves. Jr. 294; Roe v. Galliers, 2 T. R. 133; Roe v. Harrison, 2 T. R. 425; Jackson v. Corliss, 7 Johns. 531; Smith v. Putnam, 3 Pick. 221; Charles v.

Byrd, 29 S. Car. 544, 8 S. E. Rep. 1, 5; Goodbehere v. Bevan, 3 M. & S. 353, 2 Rose, 456, 16 R. R. 293; Doe d. Hutchinson v. Carter, 3 T. R. 57; Riggs v. Pursell, 66 N. Y. 193, 199.

<sup>82</sup> In re Riggs, 70 Law J. K. B. 541, (1901) 2 K. B. 16, 84 Law T. 428, 49 Wkly. Rep. 624, 8 Manson, 233.

<sup>83</sup> Randol v. Scott, 110 Cal. 590, 42 Pac. Rep. 976; In re Bush, 126 Fed. Rep. 878, 879.

<sup>84</sup> Davis v. Eyton, 7 Bing. 154; Doe v. David, 5 Tyr. 125. Roe v. Galliers, 2 T. R. 133. A covenant

ment by the lessee for the benefit of his creditors being invalidated by his subsequent bankruptcy and the vesting of all the goods of the assignor in his trustee in bankruptcy, is not a breach of a covenant not to assign. The mere execution of the deed of assignment was not the breach and, as the assignment becomes absolutely void on the assignor's involuntary bankruptcy, the lease is an asset in the hands of the trustee in bankruptcy.<sup>85</sup> Though an assignment in bankruptcy does not amount to a breach of a covenant not to assign without the consent of the landlord, the rule applies only to the creditors of the bankrupt lessee and is for their benefit. Where there is no lease but only an agreement to make a lease the expectant lessee cannot have specific performance of the contract after it has been assigned by operation of law to the trustee in bankruptcy.<sup>86</sup>

A covenant against mortgaging or incumbering the premises is against assigning or permitting an assignment in bankruptcy or otherwise is not broken by an assignment by one of two joint lessees of his individual share to his assignee in insolvency. *Randol v. Scott*, 110 Cal. 590, 42 Pac. Rep. 976. The tenant having become a bankrupt his transfer of his lease to his trustee is not a breach of his covenant not to assign or sublet; nor is it a breach of a covenant that it shall be lawful for the lessor to re-enter in case the lease is sold under an execution against the lessee. Consequently there is no forfeiture. *Gazlay v. Williams*, 147 Fed. Rep. 678. A covenant providing for re-entry in case the lessee should become bankrupt is not broken by an assignment with the consent of the lessor and the subsequent bankruptcy of the lessee. *Smith v. Gronow* (1891), 2 Q. B. 394. A condition which permits a re-entry upon the liquidation, whether voluntary or compulsory, of the lessee which is a corporation is broken and a forfeiture is incurred by the voluntary winding up of the company merely for the purpose of reconstruction and increasing the capital. *Horsey's Estate v. Steiger*, 67 Law J. Q. B. 747, 2 Q. B. 259, 79 Law T. (N. S.) 116. An underletting is not a breach of a covenant against assignment. *Jackson v. Silver nail*, 15 Johns. (N. Y.) 77. An assignment is not a breach of covenant against underletting. *Field v. Mills*, 33 N. J. L. 254. A sublease of a part of the premises is not a breach of a condition against subletting the premises. *Roosevelt v. Hopkins*, 33 N. Y. 81. Placing one in charge of leased premises is not a breach of a covenant against assignment or subletting. *Presby v. Benjamin*, 169 N. Y. 377, 62 N. E. Rep. 430. A judicial sale under a mortgage is not a breach of a covenant not to assign.

<sup>85</sup> *In re Bush*, 127 Fed. Rep. 879; *Doe d. Lloyd v. Powell*, 8 D. & R 35, 5 B. & C. 308, 4 L. J. (O. S.) K. B. 159, 29 R. R. 253.

<sup>86</sup> *Weatherall v. Geering*, 12 Ves 504.

not broken by the lessee contracting debts and not paying them upon which judgments are taken against him, even though taking the judgment is facilitated by the lessee signing a *cognovit* or warrant of attorney to confess judgment. This rule is applicable even though it appears that some of the warrants of attorney were given as collateral security for money due on mortgage and it was intended that the judgments should be signed and registered as security for the mortgage debt.<sup>87</sup> The mere vesting of a lease in the personal representative of the lessee on his death during the term, is not such an assignment of a lease as will work a forfeiture of the term under a stipulation or covenant not to assign. If such were the true rule it is obvious that every lease for years with a condition not to assign must at once terminate upon the death of the lessee which is neither consonant to common sense nor the presumed intention of the parties.<sup>88</sup>

**§ 634. Who may take advantage of a breach of a covenant not to assign.** A covenant or condition by a lessee not to as-

<sup>87</sup> Croft v. Lumley, 5 El. & Bl. 648, 25 L. J. Q. B. 2231, 2 Jur. (N. S.) 275, 4 W. R. 357. "The mere grant of a warrant of attorney to secure a just debt, or the consent to judge's order to sign judgment in a *bona fide* action to which there is no defense, would be no breach of 'a covenant not to charge or encumber,' although it might eventually lead to the lease being taken in execution." Croft v. Lumley, 5 El. & Bl. 648, p. 677, 25 L. J. Q. B. 223, 2 Jur. (N. S.) 275, 4 W. R. 357.

<sup>88</sup> Charles v. Byrd, 29 S. E. Rep. 544, 8 S. E. Rep. 1, 5; Philpot v. Hoare, 2 Atk. 219. Where a tenant under a lease forbidding assignment without the lessor's consent deposited his lease as security for a debt and subsequently became bankrupt and the lease was sold by the direction of the chancellor to pay the debt, it was held that the commissioner

in bankruptcy might assign the lease to the vendee without the consent of the lessor. Doe d. Goodbehere v. Bevan, 3 M. & S. 353, 2 Rose, 456, 16 R. R. 293. Though a sale of a lease under an execution against the lessee is not such an assignment without consent as will work a forfeiture, yet if the lessee gives a warrant of attorney to confess judgment for the purpose of enabling a creditor to take a lease in execution under the judgment in fraud of the covenant, the execution sale is void and the lessor if he has a right to enter may recover in ejectment against the sheriff's vendee. Doe d. Mitchell v. Carter, 8 T. R. 300. For an early case in which an apparently fraudulent and collusive assignment of a lease by an assignee in bankruptcy was set aside in equity, see Philpot v. Hoare, 2 Atk. 219.

sign the lease or not to sublet without the consent of the lessee is exclusively for the protection of the lessor. No one can take advantage of it except the lessor or those who are in privity with him either by contract or estate.<sup>89</sup> The grantee of the lessor or his assignee, may enforce the covenant inasmuch as it is a covenant which runs with the land. One to whom the lessor has assigned the lease cannot enforce it for the assignment of the lease or of the rents accruing under the lease leaves the reversion still in the ownership and possession of the lessor, and, inasmuch as the covenants are attached to the land, he only can enforce it in whom the right to possession is vested. Least of all can he who has caused to be broken the condition or covenant not to assign, use his default as a defence to the claim for rent. The assignee of a lease cannot, when he is sued for the rent, by the original lessor, defeat a recovery by showing that the assignment was invalid, because it was made without the written consent of the lessor where this was required by the lease. The provision for a written consent being for the benefit and protection of the lessor alone, may be dispensed with and waived by him. And his action in suing the assignee for the rent is by implication a waiver of the forfeiture.<sup>90</sup>

**§ 635. The presumption of an assignment from a stranger being in possession of the premises.**—A person who is found by the lessor in the possession of leased premises, having succeeded to the lessee's enjoyment and occupation, without the prior knowledge or consent of the landlord may be presumed by the lessor to be in possession as the assignee of the lessee. This presumption of an assignment is *prima facie* only and may be rebutted by proof of facts which will show that the occupant is merely a subtenant, a licensee or a visitor of the tenant or a trespasser and is not bound by the terms of the lease.<sup>91</sup> One

<sup>89</sup> Montecon v. Faures, 3 La. An: 43; Gordeville v. Redon, 4 La. An. 40.

<sup>90</sup> Webster v. Nichols, 104 Ill. 160, 172; Willoughby v. Lawrence, 116 Ill. 11, 22, 4 N. E. Rep. 356; Chicago Attachment Co. v. Davis Sewing Machine Co. (Ill. 1889), 25 N. E. Rep. 669, affirming 33 Ill. App. 362; Sexton v. Chicago Stor-

age Co., 129 Ill. 318, 21 N. E. Rep. 920, 16 Am. St. Rep. 274; In re, Assignment of Dickinson Co., 72 Minn. 483, 75 N. W. Rep. 731; Armsby v. Woodward, 6 Barn. & C. 519; Rede v. Farr, 6 M. & S. 121.

<sup>91</sup> Weide v. St. Paul Boom Co., (Minn.) 99 N. W. Rep. 421; Ebling v. Fuylein, 2 Mo. App. 252;

who enters upon a vacant possession with the consent or permission of the tenant, will be presumed to have taken the tenant's place so far as the rights of the landlord are concerned, though he shall disclaim all privity with the tenant.<sup>92</sup> This presumption may be rebutted by proof that the person who entered never had an assignment, as by showing that he was an undertenant, or by showing that he entered after the lease had expired, or by showing that he entered against the will of the tenant, as for example by a forcible or unlawful possession.<sup>93</sup> Where there is a covenant against an underletting the fact that a person is found in the premises appearing to be a tenant is *prima facie* evidence of an underletting sufficient to call upon the original lessee to show in what capacity such person is in possession

Ecker v. Chicago B. & Q. R. Co., 8 Mo. App. 223; Roth Tool Co. v. Champ Spring Co., 93 Mo. App. 530, 67 S. W. Rep. 967; Ecker v. Chicago Bur. & Quincy R. R., 8 Mo. App. 223; Main v. Davis, 32 Barb. (N. Y.) 461; Van Rensselaer v. Secor, 32 Barb. (N. Y.) 469; Durando v. Wyman, 4 N. Y. Super. Ct. Rep. 597; Coit v. Palmer, 30 N. Y. Super. Ct. 413, 4 Abb. (N. S.) Rep. 140; Reynolds v. Lawton, 55 Hun, 603, 8 N. Y. Supp. 403; Foster v. Oldham, 8 Misc. Rep. 331, 28 N. Y. Supp. 559, affirming 4 Misc. Rep. 201, 23 N. Y. Supp. 1024; Frank v. N. Y. L. E. & R. R. Co., 122 N. Y. 197, 219, 46 N. E. Rep. 1146; Dey v. Greenbaum, 82 Hun, 533, affirmed in 152 N. Y. 641, 46 N. E. Rep. 1146; Williams v. Woodard, 2 Wend. (N. Y.) 487; Quackenboss v. Clarke, 12 Wend. (N. Y.) 555; Clark v. Greenfield, 34 N. Y. Supp. 1, 13 Misc. Rep. 124; Washington Real Estate Co. v. Roger Williams Silver Co., 25 R. I. 483, 56 Atl. Rep. 686; Cross v. Upson, 17 Wis. 618, 623. But, compare, Tichborne v. Weir, 4 Reports, 26, 67 Law Times, 735.

<sup>92</sup> Howard v. Ellis, 4 Sand. (N. Y.) 369; Benson v. Bolles, 8 Wend. (N. Y.) 175. "The fact of possession is sufficient evidence of an assignment in the first instance. The fact of an assignment is a transaction between the lessee and another of which the plaintiff (lessor) is not cognizant, but the defendant. There is no hardship therefore, in concluding him by his possession, unless he discloses the true state of his title." By Savage C. J., in Quackenboss v. Clarke, 12 Wend. (N. Y.) 555, cited with approval in Bedford v. Terhune, 30 N. Y. 453 on p. 459, and see 2 Phil. Ev. 150 as to mode of proof of an assignment.

<sup>93</sup> Cross v. Upson, 17 Wis. 618, 623; Williams v. Woodward, 2 Wend. (N. Y.) 487; Quackenboss v. Clark, 12 Wend. (N. Y.) 555; Kain v. Hoxie, 2 Hilt. 311, 316; Frank v. N. Y. L. E. & W. R. Co., 122 N. Y. 197, 219, 25 N. E. Rep. 332; Dey v. Greenbaum, 82 Hun (N. Y.) 533, 31 N. Y. Supp. 610, 152 N. Y. 641, 46 N. E. Rep. 1146

whether as tenant or servant of the original lessee.<sup>94</sup> If the person in possession states to the lessor, that he has acquired his possession as an assignee of the lessee, he will be presumed to have assumed all the obligations of the lessee under the lease, and the burden of proof is on him where the lessor sues him for the rent to prove the contrary.<sup>95</sup> It will also be presumed where an assignment in writing is necessary under the statute of frauds that an assignment in writing has been made and that it was sufficient to transfer the term.<sup>96</sup> Where a stranger to a lease is recognized by both the lessor and lessee as sublessee, under a parol agreement, and receives the benefit of the lease, he is estopped to deny that he is a sublessee because the assignment was by parol and he is bound by the terms of the original lease.<sup>97</sup>

**§ 636. Agreements to assign leases.** It becomes important sometimes to distinguish between an assignment and an agreement to make an assignment. This question must always be determined according to the intention of the parties which can only be ascertained from the language of the instrument, which is to be construed. Thus a writing, promising to assign a lease upon the payment of installments of the purchase money but under which the lessee is to continue to perform the covenants in the lease, is not in fact an assignment but merely an agreement to assign. For it is not to have any effect until all the payments are made and the assignee is not bound to perform any covenants of the lease in the meantime.<sup>98</sup> An agreement to take an assignment of a lease, the assignment to be taken subject to the usual covenants, cannot be enforced when it is discovered that the lease contains an unusual covenant. The assignee is then entitled to rescind and to have repaid to him any deposit he may have made to secure performance.<sup>99</sup> Under an agreement to take an assignment of a lease, a party is not bound to take an assignment which contains a covenant to pay the rents and perform the covenants which are in the lease, inasmuch as such covenants impose obligations upon him not ordi-

<sup>94</sup> Doe d. Hindley v. Rickarby, Chicago, etc., R. Co., 74 Mo. App. 89.  
5 Esp. 4.

<sup>95</sup> Weide v. St. Paul Boom Co. (Minn. 1904), 99 N. W. Rep. 421.

<sup>96</sup> Weinhandler v. Eastern Brewing Co., 89 N. Y. Supp. 16.

<sup>97</sup> American, etc., Ins. Co. v. D. 52, 37 L. T. 467, 26 W. R. 331.

<sup>98</sup> Hartshorne v. Watson, 7 Scott, 495, 5 Bing. (N. C.) 477, 2 Arn. 70, 8 L. J. C. P. 299.

<sup>99</sup> Brooks v. Drysdale, 3 C. P. D. 52, 37 L. T. 467, 26 W. R. 331.

narily assumed by an assignee of a lease.<sup>1</sup> An agreement to assign a lease will not be specifically enforced by a court of equity when the lease is invalid. The general rule that a contract to convey will not be specifically enforced where the party seeking performance cannot transfer a good title will be applied to such a case. Nor will the fact that the party to whom the assignment is to be made has actually gone into possession operate to enable the other party to secure a specific performance or to estop the proposed assignee from showing the invalidity of the lessee's title, though before he shall do so, he may be under the necessity of surrendering possession.<sup>2</sup> In the case of a lease assignable only with the consent of the lessor, it is incumbent on a lessee who has contracted to assign and not upon the prospective assignee to procure such consent.<sup>3</sup> So where a lessee under such a lease became bankrupt and the assignee in bankruptcy assigned to one who subsequently agreed to re-assign the lease, the latter must procure the consent of the lessor inasmuch as the assignment by the assignee in bankruptcy was no breach of the lease.<sup>4</sup> The fact that the consent of the landlord to an assignment of a lease had not been obtained is no defense to an action for specific performance of an agreement to assign a lease brought against the lessee.<sup>5</sup> This rule is particularly applicable where a lessor has agreed not to withhold his consent if the lease is assigned to a respectable and responsible person.<sup>6</sup> And where the purchaser has agreed to accept an assignment of an existing term, he is not bound to take a new lease from the landlord merely because the tenant has failed to procure the landlord's consent.<sup>7</sup> Nor can a lessor refuse to give consent to an assignment where having permitted the assignee to go into possession he withholds consent in order to work a forfeiture. An assignee who has been let into possession of a part of the premises may compel the landlord to take him as a tenant if he can show that the refusal of the landlord to grant a license to assign was unreasonable and based, not upon any objec-

<sup>1</sup> Hall v. Hoagland, 38 N. J. Law, 450.

<sup>2</sup> Bensel v. Gray, 80 N. Y. 517, 522.

<sup>3</sup> Lloyd v. Crispe, 5 Taunt. 249.

<sup>4</sup> Winter v. Dumerque, 12 Jur. (N. S.) 726, 14 W. R. 699.

<sup>5</sup> Leitch v. Simpson, Ir. R. 5 Eq. 613.

<sup>6</sup> Hyde v. Warden, 47 L. J. Ex. 121, 3 Ex. D. 72, 37 L. T. 567, 26 W. R. 201.

<sup>7</sup> Mason v. Corder, 2 Marsh. 332, 7 Taunt. 9, 17 R. R. 427.

tion to him personally, but because the landlord wanted to get possession of the premises himself.<sup>8</sup> Inasmuch as the general rule is that a vendor of personal property has no lien for unpaid purchase money after he has parted with its possession and as a lease for a term of years is a chattel, an assignor has no lien upon the term or upon the premises to secure the unpaid purchase money which is due him by the assignee.<sup>9</sup> An assignee of a lease cannot rescind for the fraud of the lessee in procuring him to accept the assignment unless he shall act within a reasonable time after he has discovered the fraud. The assignee ought to surrender or offer to surrender the premises within a reasonable time after he has discoveed the fraud, for irrespective of any misrepresentation or fraud in the procurement of the acceptance of the assignment by him, he will continue liable to the lessor by privity of estate for the rent for the premises during the time he continues in possession. What shall constitute a reasonable time within which the assignee must rescind and surrender the possession of the premises, depends wholly upon circumstances. In a recent case it was held that an attempt to rescind an assignment on account of fraudulent representations by the lessee as to the length of the term, was made within a reasonable time, when it was made within one month after the fraud was discovered by the assignee, though the assignee was informed of the falsity of the representation as soon as he went into posession.<sup>10</sup>

**§ 637. The formal requisites of an assignment of a lease.** A lease by parol may be assigned by parol.<sup>10a</sup> Usually by the Statute of Frauds, the assignment of a lease in writing must be in writing. The form of the instrument which is claimed to be an assignment is not material, if the intention of the parties can be ascertained. If it appears from the language of the writing, that the parties intended that the instrument should be an assignment of the lease, it will be so construed no matter what form it may assume. A lease of land for years with a

<sup>8</sup> Lehmann v. M'Arthur, L. R. 3 Eq. 746, 16 L. T. 196, 15 W. R. 551.

<sup>9</sup> Cade v. Brownlee, 15 Ind. 369, 370, citing Williams on Personal Property, p. 8.

<sup>10</sup> Cunningham v. Wathen, 14 App. Div. 553, 43 N. Y. Supp. 886.

<sup>10a</sup> Barreth v. Trainer, 50 Ill. App. 420; Ross v. Schneider, 30 Ind. 423; McKinney v. Reeder, 7 Watts (Pa.) 123; Holliday v. Marshall, 7 Johns. (N. Y.) 211.

right of perpetual renewal, may be assigned by a deed as well as by an endorsement on the lease.<sup>11</sup> It is a custom to endorse the assignment on the lease or on a copy of it. Such an endorsement showing a clear intention on the part of the lessee to transfer his interest, is sufficient, whatever words may be used. The endorsement incorporates the lease by a reference to it and the lease becomes a component part of the assignment. An endorsement by which the lessee transfers all his right, title and interest of, in and to the within lease, and the premises therein described and to the rents therein reserved, would doubtless constitute a proper and complete formal assignment sufficient to convey all the interest of the assignor in the property described in the lease.<sup>12</sup> But the assignment need not be endorsed on the lease as it may be contained in a separate instrument founded on a proper consideration.<sup>13</sup> A sale by the lessee of the right to use and possess the premises so long as the lessee continues to pay rent to the lessor is an assignment.<sup>14</sup> So a bill of sale<sup>15</sup> or a quit claim deed from the owner of the premises holding over after a sheriff's sale<sup>16</sup> may operate as an assignment of a lease. In one case a bequest of an interest in a certain estate which included a lease was taken to be an assignment of the lease,<sup>17</sup> and an assignment by a lessee of all his property of any nature, kind and description, consisting of goods, wares, and merchandise in a storehouse leased by him, will be an assignment of the lease of the storehouse.<sup>18</sup> It is necessary to the validity of an assignment of a lease that it shall be accepted by the assignee. The voluntary assignment of a lease without the knowledge of the assignee and without being accepted by him, does not bind him.<sup>19</sup> Whether a lease under seal requires its assignment also to be under seal has been differently

<sup>11</sup> Esty v. Baker, 48 Me. 495.

<sup>12</sup> Clark v. Aldrich, 40 N. Y. S. 440, 4 App. Div. 523; Putnam v. Steward, 97 N. Y. 411, 414.

<sup>13</sup> Esty v. Baker, 48 Me. 495, 498. An assignment of rent may be by parol by the delivery of a note for the rent or by appropriate words in a mortgage. Bennett v. McKee (Ala. 1905), 38 So. Rep. 129.

<sup>14</sup> Indianapolis Mfg. & Carpenters' Union v. Cleveland C. C. & I. Ry. Co., 45 Ind. 281, 286.

<sup>15</sup> Clark v. Greenfield, 13 Misc. Rep. 124, 34 N. Y. Supp. 1.

<sup>16</sup> Prettyman v. Walston, 34 Ill. 175.

<sup>17</sup> Martin v. Tobin, 123 Mass. 85.

<sup>18</sup> Boyce v. Bakewell, 37 Mo. 492.

<sup>19</sup> McFarland v. Heim, 127 Mo. 327, 29 S. W. Rep. 1030.

decided. In one case it has been held that a lease under seal can be assigned only by a deed under the rule that an instrument of transfer must be of as high a nature as the instrument transferred.<sup>20</sup> On the other hand it has been held, and this is certainly the modern rule, that a lease under seal may be assigned by an instrument not under seal, and such an assignment is in all respects sufficient to pass title to the assignee, and gives him the same rights, by action or otherwise, that the original lessee had prior to the assignment.<sup>21</sup>

**§ 638. The validity of an assignment.** This is usually tested by the general rules and principles regulating the validity of contracts. The assignment must be based upon a valuable consideration, and, where the statute of frauds requires it, the assignment must be in writing. In the absence of an express provision in the lease, or a statute requiring the landlord to consent to the assignment, an assignment otherwise valid, will not be set aside merely because the landlord has not consented to it. An immediate change of possession from the lessee to the assignee of the lease is not indispensable to the validity of the assignment, for an assignment of an unexpired term of a lease is valid, though the entry of the assignee is to take place in the future.<sup>22</sup> But an assignment of a lease or a contract to make such an assignment is invalid and cannot be enforced by the assignee against the assignor where the premises were originally leased for an illegal or immoral purpose, or had been occupied for such a purpose by the lessee, and particularly where the assignee at the date of the assignment knew of the illegal occupation of the premises. If the assignee knew of the illegal occupation of the premises prior to the assignment, it may be fairly presumed that he intended to continue to use them for that purpose.<sup>23</sup> An assignment of a lease to be valid and binding on the assignee, must be accepted by him.<sup>24</sup>

**§ 639. Knowledge of the contents of the lease by the assignee.** As against the lessor, the assignee of a lease from a tenant who is in possession of the premises, is presumed to be

<sup>20</sup> Brewer v. Dyer, 7 Cush. (Mass.) 337, 338.      <sup>23</sup> Riley v. Jordan, 122 Mass. 231, 234.

<sup>21</sup> Keeley Brewing Co. v. Mason, 102 Ill. App. 381.      <sup>24</sup> Maynard v. Maynard, 10 Mass. 457; Townsend v. Tickell, 5 E. C. L. 31.

<sup>22</sup> Williams v. Downing, 18 Pa. St. 60.

acquainted with the terms and covenants of the lease.<sup>25</sup> Nor is it necessary that the lease shall be recorded to affect the assignee of the lease with notice of its contents, for it is the right of the assignee to have an inspection of it and if he shall fail to demand that the lessee shall permit him to read it, he will still be responsible, for the rule of *caveat emptor* applies to the purchase of a lease to the same extent that it does to the purchase of any other species of personal property.<sup>26</sup> Hence a person taking an assignment of a lease containing a clause which gives notice of its liability to be forfeited for an assignment or any other reason, is bound to ascertain whether it has been forfeited before he takes the assignment.<sup>27</sup> The lessor is not bound to notify an assignee of the forfeiture before he exercises his right to re-enter on the premises.<sup>28</sup> An assignee of a mining lease is bound to take notice not only of the covenants of the lease but also of the fact that mining is going on under the lease, and that royalties were periodically falling due for the amount. He is also bound to ascertain whether the royalties have been paid and the exact state of the accounts between his assignor and the lessor.<sup>29</sup> The assignee, however, is not presumed to know nor is he bound by any oral agreements between the lessor and the lessee and he acquires his interest in the lease free from all liability for covenants or agreements which have been created in this mode.<sup>30</sup> One who agrees to buy

<sup>25</sup> Barroilhet v. Battelle, 7 Cal. 450; Indianapolis Mfg. & Carpenters' Union v. Cleveland C. C. & I. R. Co., 45 Ind. 281; Comegys v. Russell, 175 Pa. St. 166, 34 Atl. Rep. 657; Maxwell v. Urban, 22 Tex. Civ. App. 565, 55 S. W. Rep. 1124; Taylor v. Stibbert, 2 Ves. 437; Lewis v. Stephenson, 67 Law J. Q. B. 296, 299, 78 Law T. (N. S.) 165; Daniels v. Davison, 16 Ves. 249, 254. As to misrepresentations by the lessor of the contents of the lease see Powell v. F. C. Linde Co., 60 N. Y. Supp. 1044.

<sup>26</sup> The English rule is slightly different. There it is held that a person contracting to purchase leasehold property is held to con-

tract with notice of the usual clauses in the lease. Walter v. Maunde, 1 J. & W. 181, 21 R. R. 141. He cannot be held to have constructive notice of clauses of an extraordinary and unusual character unless he has had a reasonable opportunity of examining the lease itself. Reeve v. Berridge, 20 Q. B. 523, 57 L. J. Q. B. 265.

<sup>27</sup> Carnegie Natural Gas Co. v. Philadelphia Co., 158 Pa. St. 317, 27 Atl. Rep. 951.

<sup>28</sup> Comegys v. Russell, 175 Pa. St. 166, 34 Atl. Rep. 657.

<sup>29</sup> Comegys v. Russell, 175 Pa. St. 166, 34 Atl. Rep. 657, 658.

<sup>30</sup> Thompson v. Christie, 138 Pa.

two leases without inquiring into the lessor's title, cannot refuse to perform his contract to buy on the ground that the lessor's title is bad.<sup>31</sup> An assignee in good faith and without actual knowledge is not affected by the fact that the lessor had been fraudulently induced by the lessee, his assignor, to make the lease. The assignee of a lease from the lessee who is not shown to have taken it with knowledge or notice of the fraud by which it is alleged, that the lease was procured, is a *bona fide* purchaser so far as the lessor is concerned. If the lessor shall begin an action to have the lease set aside for fraud after it has been assigned by the lessee, he must allege and prove that the assignee had notice of the fraud prior to the assignment.<sup>32</sup>

**§ 640. The implied warranty of the title by the assignor of the lease.** Inasmuch as a term for years is personal property

St. 230, 20 Atl. Rep. 934, 936, 11 L. R. A. 236, 27 W. N. C. 87; Springer v. Citizens' Natural Gas Co., 145 Pa. St. 430, 22 Atl. Rep. 986, holding that an oral explanation of a clause in a lease between a lessor and lessee does not affect or vary the liability of the assignee who knew nothing of the explanation when he received the assignment.

<sup>31</sup> Spratt v. Jeffry, 10 B. & C. 249, 259, 5 M. & Ry. 188, 8 L. J. (O. S.) K. B. 114. The assignee of the lease has a right to assume that a clause which was in the printed form of a lease and which has been stricken out is not binding upon the lessee. So where a covenant on the part of a lessee to pay water rates is erased from the lease an assignee of the lease who takes it with a written consent of the lessor is not liable to pay the water rates in the absence of an express agreement in the assignment to the contrary, though while in the occupancy of the premises he consumed more than the usual quantity of water. Darcey v. Steger, 50 N. Y. Supp. 638, 23 Misc. Rep. 145.

<sup>32</sup> Isom v. Rex Crude Oil Co., 147 Cal. 659, 82 Pac. Rep. 317, 318. It was also held that it was not sufficient that the evidence showed facts which might have put a prudent person on guard in taking the assignment. The pleading must show knowledge of the fraud on the part of the assignee and where it does not the assignee is presumed to be an innocent purchaser for value and without notice and the fraud of an assignor cannot be ground for cancelling a lease which has been innocently acquired. An assignee of a written lease in good faith and for value has all the rights of a *bona fide* purchaser for value. He is not bound by any secret trust or agreement between his assignor and the lessor until he has actual notice of it. He is not bound by a parol agreement that the term shall be surrendered or the lease forfeited of which he has no notice when he takes his assignment. Thompson v. Christie, 138 Pa. St. 230, 20 Atl. Rep. 934, 936, 11 L. R. A. 236, 27 W. N. C. 87.

it follows that the assignment of a term is governed in general by the rules of the common law applicable to the sales of personal property. The rule of *caveat emptor* is applicable as regards the nature and conditions of the term and the purchaser is bound to inform himself fully as to the agreements and covenants of the lease.<sup>33</sup> The lessee by implication warrants the title, under the general rule that the seller of a chattel who is in possession warrants by implication that it is his own and that he will be answerable to the purchaser of it in case it shall be taken from him by one having a better title. The implied covenant of warranty in the assignment of a lease is valid and operative irrespective of the fact that the assignor of the lessee was or was not ignorant of the defective condition of his title. He must make a good title whether he was ignorant that his own title was insufficient or whether he knew it was defective and misrepresented it or remained silent. The lessee by implication not only warrants his own title, but he warrants the title of his lessor as well and the right of the latter to demise.<sup>34</sup> A lessee in assigning his term is bound to transfer to his assignee a good and valid title to the term which he has assigned or agreed to assign. He is bound to see that he is admitted and maintained in possession. If the person to whom the lessee has agreed to assign shall discover before he has performed that the

<sup>33</sup> Rosenbaum v. Gunter, 3 E. D. Smith, 203.

<sup>34</sup> Souter v. Drake, 5 Barn. & Adol. 992, 1002; Farrer v. Nightingal, 2 Esp. 639; Jeffers v. Easton, Eldridge & Co., 113 Cal. 345, 354, 45 Pac. Rep. 680; Krause v. Krause, 58 Ill. App. 559; Bensel v. Gray, 38 N. Y. Super. Ct. 447; Spratt v. Jeffry, 10 B. & Cr. 249, 259, 5 M. & Ry. 188, 8 L. J. (O. S.) K. B. 114; Wetzell v. Richcreek, 53 Ohio St. 62, 69, 40 N. E. Rep. 1004. In Waldo v. Hall, 14 Mass. 486 and Blair v. Ramkin, 11 Mo. 440, 442, it is said that there is no implied covenant on the part of the assignor against an eviction of the assignee by the lessor. See, also, Sanborn v. Cree, 3 Colo. 149,

In Souter v. Drake, 5 B. & Ad. 992, the court said that in a contract for the sale of a lease there is an implied contract to make out the lessor's title to demise as well as that of the vendor to the lease itself which implied undertaking is available in law as well as in equity. Where the term is less than was agreed to be assigned, the contract is at an end. The buyer may bring an action for money had and received and he is not compelled to take a term as it is with an allowance *pro tanto* for the time which is lacking. He must have what he agreed to buy and nothing else. Farrar v. Nightingal, 2 Esp. 639.

lessee has no title, or that his term is forfeited or is forfeitable by an assignment, he may refuse to perform and recover any money he may have paid in part payment together with the reasonable expenses to which he may have been put.<sup>35</sup> So, the assignee may set up the total breach of this implied warranty of title as a defense in an action brought against him by the lessee to recover a balance of the purchase money or he may sue the lessee to recover an installment of the purchase money which he has paid. Nor need the assignee of the lessee wait until he has actually been ousted, for he may yield the possession of the demised premises to one claiming under a paramount title without waiting for the latter to employ force or legal proceedings.<sup>36</sup> A tenant who knowing that he is prohibited by his lease from subletting without the consent of his landlord, sublets and then induces his landlord to oust the sublessee upon the grounds of failure to procure the landlord's consent, is liable to the subtenant for damages where he was unable to procure other lands.<sup>37</sup>

**§ 641. The assignee's rights as against the lessor.** The assignment of the lease by a lessee confers upon the assignee all the rights which the assignor possessed under its covenants against the lessor. The assignee may also enforce against third persons all the rights which the assignor possessed against such persons by reason of his occupancy and payment of rent. The assignee may maintain trespass against a stranger who enters upon the premises without his consent, or against the original lessor. If the lessor endeavors to enforce a covenant of the lease against the assignee, the latter may assert any right that his assignor might have enjoyed under the lease.<sup>38</sup> The assignee also may take advantage of a covenant conferring a privilege

<sup>35</sup> Murray v. Harvey, 56 N. Y. 337, 342.

<sup>36</sup> Jeffers v. Easton, Eldridge & Co., 113 Cal. 345, 354, 45 Pac. Rep. 680. The failure of the lessee to obtain the consent of his lessor to the assignment as required by the lease will justify the assignee in refusing to accept the assignment. For an agreement by a lessee to assign his term is not performed by the execution and delivery of

the instrument of assignment, without the assent of the lessor in a case where his assent is expressly required to be given. Austin v. Harris, 10 Gray (Mass.) 296.

<sup>37</sup> Calvert v. Hobbs, 107 Mo. App. 7, 80 S. W. Rep. 681.

<sup>38</sup> Thomas v. Conrad, 25 Ky. Law Rep. 169, 74 S. W. Rep. 1084. Rehearing denied, 71 S. W. Rep. 903.

of a renewal upon the assignor or permitting him to use the premises for a particular purpose or permitting him to remove property from the premises at the termination of the lease, or giving him an option to purchase the premises.<sup>39</sup> The assignee of the lease, however, cannot enforce against his assignor any covenants by which the assignor is bound to do anything for the benefit of the lessor.<sup>40</sup> An assignor of a term who has delivered possession to his assignee cannot thereafter intrude on the demised premises without the consent of the assignee and if he shall do so may be regarded as a trespasser and enjoined.<sup>41</sup> A lessee who assigns his lease is bound to procure it and deliver it to the assignee, and where it has been deposited by the lessee as security and he fails to procure it, he is in default as regards the assignee.<sup>42</sup> After a lessor has, by his silence and conduct waived his right to object to an assignment without his written consent, the assignee becomes vested with all the rights of the assignor and the assignee may demand and enforce against the lessor a covenant to renew contained in the lease.<sup>43</sup> If a lessee for a term for years demises for a greater period than he has, or assigns a term which is longer than he has, he gains nothing by it. It is merely an assignment of what he has and the excess is void. It confers no rights on the assignee as against the lessor but might give the assignee the benefit of the excess as against the assignor and lessee in the event of his procuring a renewal of the term upon its expiration.<sup>44</sup>

**§ 642. The assignee's liability upon the covenants of the lease.** The assignment of a lease by a lessee creates a privity of estate between the assignee and the lessor immediately upon the acceptance of the lease by the assignee.<sup>45</sup> After the accep-

<sup>39</sup> Blakeman v. Miller, 136 Cal. 138, 68 Pac. Rep. 587.

<sup>40</sup> Findlay v. Carson, 97 Iowa, 537, 66 N. W. Rep. 759. Where the assignee of a lessee under a mining lease sought to enforce a covenant by the lessor which bound him to devote his whole time to mining on the demised premises and forbade him from mining elsewhere.

<sup>41</sup> Simpson v. Moorhead, 65 N. J. Eq. 623, 56 Atl. Rep. 887.

<sup>42</sup> Barton v. Banks, 2 F. & F. 213.

<sup>43</sup> Warner v. Cochrane, 128 Fed. Rep. 553, 556, 63 C. C. A. 207.

<sup>44</sup> Hicks v. Downing, 1 Lord Raym. 99.

<sup>45</sup> Salisbury v. Shirley, 66 Cal. 223, 5 Pac. Rep. 104; Farmer's Bank v. Mutual Assurance So-

tance of the lease by the assignee he will be liable to the lessor by reason of this privity of estate for all breaches of covenants, which run with the land occurring during his occupation of the premises or, even if he shall not occupy the premises, for all breaches of covenants occurring between the date of his acceptance of the assignment and the termination of the lease, or to the date of his assignment of the lease.<sup>46</sup> Thus the assignee will generally be liable for all rent accruing while he is in privity of estate with the lessor as well as for taxes and water rates which may become due and payable where his assignor had agreed to pay the taxes.<sup>47</sup> So an assignee by contract is usually liable while he is in possession on covenants in the lease to repair.<sup>48</sup> But the assignee of a lease is not liable to the lessor for the breach of a covenant, which does not run with the land unless he is expressly named in the lease.<sup>49</sup> Where a person be-

ciety, 4 Leigh (Va.) 69, 84; Werdner v. Foster, 2 P. & W. (Pa.) 26.

<sup>46</sup> *Salisbury v. Shirley*, 66 Cal. 223, 225, 5 Pac. Rep. 104; *Coburn v. Goodall*, 72 Cal. 498, 14 Pac. Rep. 190, 1 Am. St. Rep. 75; *Springer v. Chicago R. E. Loan Co.*, 202 Ill. 17, 24, 66 N. E. Rep. 250; *Abraham v. Tape*, 60 Md. 317 (mortgagee); *Torrey v. Wallis*, 3 CUSH. (Mass.) 442; *Grundin v. Carter*, 99 Mass. 15, 16; *Trask v. Graham*, 47 Minn. 571, 573, 50 N. W. Rep. 917; *Lee v. Payne*, 4 Mich. 106, 119; *Doty v. Heth*, 57 Miss. 530, 534, 535; *Lindsley v. Schnaide Brewing Co.*, 59 Mo. App. 271; *Hynes v. Ecker*, 34 Mo. App. 650; *Dolph v. White*, 12 N. Y. 296, 301; *Post v. Kearney*, 2 N. Y. 394, 51 Am. Dec. 303; *Graves v. Porter*, 11 Barb. (N. Y.) 592; *Jacques v. Short*, 20 Barb. (N. Y.) 269; *Journeay v. Brackley*, 1 Hilt. (N. Y.) 447; *Van Schaick v. Third Ave. R. R. Co.*, 38 N. Y. 346; *Kribbs v. Alford*, 120 N. Y. 519, 525, 24 N. E. Rep. 811; *Dunlap v. James*, 174 N. Y. 411, 414, 67 N. E. Rep. 60;

*Stewart v. Long Island R. Co.*, 102 N. Y. 601, 607; *Pabst v. Rochester Laundry Co.*, 171 N. Y. 584, 64 N. E. Rep. 504; *Masury v. Southworth*, 9 Ohio St. 340; *Harvey v. McGrew*, 44 Tex. 412, 415; *Pollard v. Schaeffer*, 1 Dall. 210, 1 L. ed. 104, 1 Am. Dec. 239.

<sup>47</sup> *Salisbury v. Shirley*, 66 Cal. 223, 226; *Grundin v. Carter*, 99 Mass. 15, 16; *Allen v. Culver*, 3 Denio (N. Y.) 290, 301; *Post v. Kearney*, 2 N. Y. 394; *McKeon v. Wendelken*, 55 N. Y. Supp. 626, 25 Misc. Rep. 711. The lessor may pay the taxes and recover the amount of the assignee. *Wills v. Summers*, 45 Minn. 90, 47 N. W. Rep. 463.

<sup>48</sup> *Minshull v. Oakes*, 2 H. & N. 793, 27 L. J. Ex. 194, 4 Jur. (N. S.) 170; *Martyn v. Clue*, 18 Q. B. 661, 22 L. J. Q. B. 147; *Merceron v. Dowson*, 5 B. & C. 479, 8 D. & R. 264, 4 L. J. (O. S.) K. B. 211; *Neale v. Wyllie*, 5 D. & R. 442, 3 B. & C. 533, 27 R. R. 418.

<sup>49</sup> *Grey v. Cuthbertson*, 2 Chit. 482, 4 Dougl. 351.

comes an assignee by contract his acceptance of the assignment being to his advantage may be presumed, but where one becomes an assignee by operation of law, his acceptance must affirmatively appear or he will not be in general chargeable with the performance of the covenants of the lease until he enters or does some act showing his acceptance of the assignment. He may accept without entry but he is not compelled to take the assignment by operation of law and will be not liable on covenants which run with the land unless it is shown that he has accepted the assignment.<sup>50</sup> The assignee is never liable for a breach of any covenant by any of his predecessors where he takes the assignment after the breach.<sup>51</sup> And on the other hand the assignee of a lease may claim as against the lessor while he is in privity of estate with the lessor the benefit of all covenants which run with the land.<sup>52</sup> The assignee of a lease containing a covenant requiring the lessee to pay taxes rates and assessments during the continuance of the term must pay all taxes which become a lien on the premises during the term, and if he shall fail to do so, the lessor or his assignee may pay the taxes before they become delinquent under the statute, and recover against the assignee of the lessee. So the assignor being liable under his covenant to pay taxes may pay them and recover the amount from the assignee whose duty it was to pay them by reason of his privity of estate. And the assignor is not a meddler for even though he has parted with his interest in the term he must still pay taxes

<sup>50</sup> Whitcomb v. Starkey, 63 N. H. 607, 608, 4 Atl. Rep. 793; Williams v. Bosanquet, 1 Brod. & Bing. 238. A devisee is an assignee by operation of law. Hence a devisee of an unexpired term, who does not enter upon the demised premises nor in any way signify his intention to accept the term is not liable for the rent. Whitcomb v. Starkey, 63 N. H. 607, 608.

<sup>51</sup> Tillotson v. Boyd, 6 N. Y. Super. Ct. 516; Dananberg v. Reinheimer, 53 N. Y. Supp. 794, 24 Misc. Rep. 712; Washington Natural Gas Co. v. Johnson, 123 Pa. St. 576, 16 Atl. Rep. 799, 10

Am. St. Rep. 533, 23 N. N. C. 294; Farmers' Bank v. Mutual Assurance Soc., 4 Leigh (Va.) 69.

<sup>52</sup> Laffan v. Naglee, 9 Cal. 662, 70 Am. Dec. 678; Shelton v. Codman, 3 Cush. (Mass.) 318; Blackmore v. Boardman, 28 Mo. 420; Wilkinson v. Pettit, 47 Barb. (N. Y.) 230; McClenahan v. Gwynn, 3 Munf. (Va.) 556; Hunt v. Danforth, 12 Fed. Cases, 6887, 2 Curts, 592. Note. The proper and only remedy by a lessor against an assignee of the lease to recover the rent is by an action of covenant or debt upon the deed. Brewer v. Dyer, 7 Cush. (Mass.) 337, 339.

if his assignee does not.<sup>53</sup> The assignment of the lease by the lessee carries with it and vests in the assignee a right to enforce all the covenants contained in the lease as against the lessor to the same extent as the assignor could have enforced them.<sup>54</sup> The assignee enjoys these rights only where he has an executed assignment or an executed contract to assign. An executory contract to assign under which no actual assignment has been made gives the assignee no rights against the original lessor. Thus one having an executory contract to assign cannot maintain trespass against the lessor or an action to recover the premises as against an owner who has leased them to his assignor and who while the assignment remains executory enters upon the premises for the purpose of terminating the lease. Until the assignee enters on the premises his rights are equitable merely,<sup>55</sup> at least so far as the lessor is concerned though he may have any remedy at law arising by and under his contract with his assignor. The assignee is not however bound to perform the personal covenants of the lessee to third persons. Thus where a lessee who had personal property attached to the premises the title to which was to remain in him under the terms of the lease, mortgaged his interest in the lease and in his fixtures and subsequently assigned his term, the lien of the mortgage does not attach to the personality placed upon the premises by the assignee of the lessee, after the assignment. Of course the assignee under such circumstances may by a proper express covenant make himself liable as a surety to the mortgagee and may even

<sup>53</sup> Wills v. Summers, 45 Minn. 90, 47 N. W. Rep. 463, holding also that a lessor cannot, after he has parted with his interest in the premises, recover from the assignee of his lessee taxes which he has paid after the assignment unless he has by a covenant with his grantee agreed to indemnify the grantee against the payment of taxes upon the premises. But in England it has been held that the proper form of action by the lessor against the assignee to recover rent due under a covenant of the lease is not an action

of covenant because the assignee has not covenanted by deed with the lessor but that rent may be recovered against him *in assumpsit* upon the theory of an implied promise or in an action on the case. Burnett v. Lynch, 5 B. & C. 589, 8 D. & R. 368, 4 L. J. (O. S.) K. B. 274, 29 R. R. 343; Hawkins v. Sherman, 3 Car. & P. 459.

<sup>54</sup> Warner v. Cochrane, 128 Fed. Rep. 553.

<sup>55</sup> Boston El. Ry. Co. v. Grace & Hyde Co., 112 Fed. Rep. 279, 50 C. C. A. 239.

creates a new lien on his own personal property placed on the premises. And he may be deprived of the personal property which was on the premises when he took his assignment because by the filing of the chattel mortgage he takes with a constructive notice of the lien.<sup>56</sup> The assignees of the lessee though taking in unequal parts, are jointly and severally liable to the lessor for the entire damages sustained by a breach by them of a covenant to surrender the possession at the expiration of the term.<sup>57</sup>

**§ 643. The right of the landlord to distrain after the assignment by the tenant.** An assignment by the tenant for the benefit of his creditors does not deprive the landlord of his right at common law to distrain for rent which has accrued prior to the assignment nor does it destroy any statutory lien he may have.<sup>58</sup> So long as the goods remain in the hands of the assignee on the premises they are liable to a distress. The mere fact that the

<sup>56</sup> Kribbs v. Alford, 120 N. Y. 519, 525, 24 N. E. Rep. 811. An agreement by the assignee to "fulfill the lease in all things on their part" will bind him to perform all covenants in the lease itself as well as a subsequent agreement endorsed upon it. White v. Loomis, 27 Hun (N. Y.) 328, 330. "It is the generally accepted doctrine that, when a tenant occupies premises under an implied letting, or when the contract of letting is express but contains no express covenant to pay rent other than that implied from occupancy, the right of the landlord to collect rent, arises out of a privity of estate only. When, however, the contract of letting is express, and contains a covenant by the lessee to pay the rent reserved, then both privity of estate and privity of contract are established and the right of the lessor to enforce the payment of rent is then of a two-fold nature; that is by reason of occupancy by the lessee which establishes privity of estate and by reason of the covenant in the

lease which establishes privity of contract. In cases of implied letting, or where there is no express covenant, whenever there is a change of possession with the consent of the lessor, the lessee is thereby discharged from the further payment of rent, because the privity of estate, which is the only relation existing in such cases, between the lessor and lessee is completely destroyed by change of occupancy. But not so where the lease contains an express covenant to pay the rent. In such case the privity of estate may be destroyed by the consent of the lessor to an assignment, but, in the absence of a contract of release, the lessee still remains bound on his covenant to pay rent." By the court, by Biggs J. in Charless v. Froebel, 47 Mo. App. 45 on page 49.

<sup>57</sup> Coburn v. Goodall, 72 Cal. 498, 14 Pac. Rep. 190.

<sup>58</sup> O'Hara v. Jones, 46 Ill. 288; Powell v. Dailey, 61 Ill. App. 552; Paine v. Sykes, 72 Miss. 351, 16 So. Rep. 903

personal property of the tenant is included in an assignment for the benefit of his creditors does not privilege it from being distrained upon unless it is removed from the demised premises in which event the right to distrain is lost.<sup>59</sup> The landlord must be vigilant for, if after the rent is due and in arrears he permits the assignee to remove the goods from the premises his right to a distress is lost and he is then on an equality with respect to such goods and the proceeds of their sale with the other creditors.<sup>60</sup> Under the statutes creating the landlord's lien the landlord may prosecute his lien on the goods while in the hands of the assignee for the benefit of creditors without the levy of a distress warrant or an attachment for the rent.<sup>61</sup> In South Carolina where the statute declares that no property shall be seized under a distress warrant for rent unless it "belongs to the tenant in his own right" any personal property on the premises cannot be distrained, after the tenant assigned for the benefit of his creditors because after this takes place the property is no longer his.<sup>62</sup> The landlord and the tenant cannot by a stipulation in the lease creating a lien in favor of the former for rent upon the personal property of the tenant which it is stipulated by them shall be in the nature of a chattel mortgage and which was to be enforced according to the agreement of the parties on default of payment of rent create a preference which shall prevail against the claims of the creditors where the tenant subsequently makes an assignment for the benefit of his creditors. As between the parties to the lease such an agreement would unquestionably be valid both as to the property of the tenant upon the premises when the lease was made and as to the property placed thereby subsequently as to creditors of the lessee having actual notice of this lien created by the lease.

**§ 644. The liability of the assignee to his assignor.** The assignor of a term where there is no surrender, *i. e.* where the as-

<sup>59</sup> Hoskins v. Paul, 9 N. J. Law, 110, 17 Am. Dec. 455; Hastings v. Belknap, 1 Denio (N. Y.) 190.

<sup>60</sup> Morris v. Parker, 1 Ashm. (Pa.) 187.

<sup>61</sup> Loth v. Carty, 85 Ky. 591, 4 S. W. Rep. 314; Rosenberg v. Sharper, 51 Tex. 134.

<sup>62</sup> Bischoff v. Trenholm, 36 S. C. 75. 15 S. E. Rep. 346; following Ex parte Knobeloch, 26 S. Car. 333, 2 S. E. Rep. 776. In this state the statutory lien is defeated by an assignment of the tenant for the benefit of his creditors. Dial v. Levy, 39 S. Car. 265, 17 S. E. Rep. 776.

signee is not accepted by the lessor as his own tenant is primarily liable to the lessor on his covenant to pay rent and as his liability thus continues during the continuance of his assignee's possession he is entitled to be indemnified by the assignee if he is compelled to pay the rent to the lessor. The assignee while he remains in the possession of the premises is by implication obligated to re-imburse his assignor if he pays the rent which is the compensation paid to the lessor for the benefits derived from the possession. A lessee who, by reason of the failure of his assignee to perform the covenants in the lease, has been compelled to pay rent or damages to the lessor for breach of covenants can maintain an action against the assignee for damages. The lessee has by reason of the assignment become a surety for the assignee though as between himself and the lessor the assignor is the principal. The assignee is bound as principal to pay the rent and to perform the covenants of the lease, and the surety, after paying the debt or performing the obligation incumbent on his principal has his remedy against him. The assignor would in all probability have the same remedy against each subsequent assignee in respect to breaches committed by them during the continuance of the interest of each.<sup>63</sup> This rule applies to a case where one of two lessees jointly and severally liable to the lessor assigns to the other lessee.<sup>64</sup> The assignor in such case is still primarily liable on his covenant to the lessor for the rent but, as to the assignee the assignor is a surety only and only upon his paying the rent has he any remedy over against the assignee as the principal debtor.<sup>65</sup>

**§ 645. The assignee's liability to the lessor for the rent.** An assignee of a lease by reason of the privity of estate which is created by the assignment between him and the lessor becomes liable to the lessor on the lessee's covenant to pay rent for all rent which may accrue during the assignment.<sup>66</sup> The assignee

<sup>63</sup> Patten v. Deshon, 1 Gray (Mass.) 325, 330; Farrington v. Kimball, 126 Mass. 313, 315; Burnett v. Lynch, 5 B. & C. 589; Wolveridge v. Steward, 1 Cr. & M. 644, 660; Moule v. Garrett, L. R. 5 Ex. 132, affirmed in L. R. 7 Ex. 101.

<sup>64</sup> Moule v. Garrett, L. R. 7 Exch. 101, 104.

<sup>65</sup> Wolveridge v. Steward, 1 Cr. & M. 644, 660; see, also, Humble v. Langston, 7 Mee. & Wel. 517, 530.

<sup>66</sup> Benedict v. Everard, 73 Conn. 157, 46 Atl. Rep. 870; Collins v. Pratt, 181 Mass. 345, 63 N. E.

having enjoyed the possession must when the assignment is invalid without the assent of the lessor pay his rent to his assignor until such time as the lessor consents to the assignment. He cannot pay the rent to the original lessor nor be sued for the rent by the lessor for no privity exists between them until the lessor has consented to the assignment. Yet he must pay for his use of the premises to some person. And though where the assignee has come into privity with the lessor the assignor cannot sue the assignee until he has himself paid the lessor where there is no privity the assignor and lessee may sue the assignee though he has not yet paid the rent to the lessor.<sup>67</sup> An assignee in possession as such and claiming as regards the landlord that he is in possession as an assignee of the lease in an action by the landlord for the rent is estopped to deny the validity of the assignment. The rent is the compensation for the possession and so long as he remains in possession he must pay rent whether the original agreement with the lessee was or was not valid. Nor need the assignee be in personal possession for the possession of his tenant is his possession.<sup>68</sup> The purchaser at a foreclosure sale of a leasehold assumes on taking possession the relation of a privy in estate with the original lessor, and is treated as an assignee having all the rights and assuming all the liabilities and obligations pertaining to an assignee.<sup>69</sup>

Rep. 946; Darmstaetter v. Hoffman, 120 Mich. 48, 78 N. W. Rep. 1014; Ginzburg v. Ecker, 28 Mo. App. 258; Hogg v. Reynolds, 61 Neb. 758, 86 N. W. Rep. 479; Mead v. Madden, 85 App. Div. 10, 82 N. Y. Supp. 900; McLean v. Caldwell, 107 Tenn. 138, 64 S. W. Rep. 16; Sayles v. Kerr, 4 App. Div. 150, 38 N. Y. Supp. 880; Frank v. Railroad Co., 122 N. Y. 197, 25 N. E. Rep. 332, 33 N. Y. St. Rep. 235; Dolph v. White, 12 N. Y. 296, 300; Crowley v. Gormley, 69 N. Y. Supp. 576, 577, 59 App. Div. 256, 103 N. Y. St. Rep. 576; Bonetti v. Treat, 91 Cal. 223, 229, 27 Pac. Rep. 612, 14 L. R. A. 451; Walker v. Dohan, 39 La. Ann. 743, 2 So. Rep. 381; Congre-

gational Society v. Rix, (Vt.) 17 Atl. Rep. 719.

<sup>67</sup> Darmstaetter v. Hoffman, 120 Mich. 48, 78 N. W. Rep. 1014.

<sup>68</sup> Carter v. Hammett, 18 Barb. (N. Y.) 608, 611.

<sup>69</sup> McLean v. Caldwell, 107 Tenn. 138, 64 S. W. Rep. 16. One who acquires by assignment the lessee's entire interest in a distinct part of the land is, as to such part, in privity of estate with the lessor and liable to him for a proportionate share of the rent. But such assignee is not in privity of estate with the lessor as to any portion of the land not covered by the assignment and is therefore not liable for the entire rent reserved by the lease. Hogg

**§ 646. The liability of the assignee not in possession for rent.** Where the lessee makes an absolute assignment of the whole term, the assignee thereby becomes responsible, after he has accepted the assignment, for rent subsequently accruing and for the subsequent breach of covenants running with the land though he never takes possession of the premises.<sup>70</sup> The assignee of a lease becomes liable for rent by reason of privity of estate, and not by reason of occupation of premises.<sup>71</sup> This is the general rule and is well supported by the authorities. The apparent exceptions to it which make the liability of the assignee of the lease to the lessor depend upon the possession, are usually distinguished by some other element than the possession. The acceptance by the assignee of an absolute assignment usually renders him liable for rent to the landlord because the lessee who assigns has expressly covenanted to pay the rent and because this is a covenant which runs with the land. If, however, from no fault of his own the assignee is unable to obtain possession and particularly if he is kept out of possession by the lessor he cannot be compelled to pay for what he has not received.<sup>72</sup> So, also if the assignment of the lease was merely intended as a mortgage or as a security it will be presumed that the parties never intended that the assignee should have possession but that the mortgagor should continue in possession and on this presumption of intention the law will not hold the assignee liable for the rent to the lessor. If the whole or entire estate is assigned with the consent of the lessor and the assignee fails to enter into

v. Reynolds, 61 Neb. 758, 86 N. W. Rep. 479.

<sup>70</sup> Benedict v. Everard, 73 Conn. 157, 46 Atl. Rep. 870; Babcock v. Scoville, 56 Ill. 461; Smith v. Brinker, 17 Mo. 148; Willi v. Dryden, 52 Mo. 319; Lindsley v. Schneide Brewing Co., 59 Mo. App. 271, 273; Tate v. Neary, 65 N. Y. Supp. 40, 52 App. Div. 78, 99 N. Y. St. Rep. 40; Tate v. McCormick, 23 Hun, 221; Walker v. Cromley, 14 Wend. (N. Y.) 63, 64; Fennell v. Guffey, 155 Pa. St. 38, 25 Atl. Rep. 785; Pingry v. Watkins, 17 Vt. 379.

<sup>71</sup> Guinzburg v. Claude, 28 Mo. App. 258. In Tate v. Neary, 52 App. Div. 78, 65 N. Y. Supp. 40, a lease covering two lots was assigned. The assignee paid rent on one but refused to pay on the other because he had never taken possession. It was held that by paying rent on one he had ratified the assignment and acknowledged its validity and could not refuse to pay rent because he had not taken possession of the other.

<sup>72</sup> Dengler v. Michelssen, 76 Cal. 125.

possession without an excuse he is bound to the lessor to pay rent though he is not in possession. Where an assignee of a lease re-assigned the lease to his assignor but continued in possession of the premises after the re-assignment it will be presumed, in absence of evidence to the contrary, that he was a tenant of the assignor.<sup>73</sup>

**§ 647. Express covenants in the assignment.** It is competent for the parties to an assignment of a lease to insert in the instrument of assignment any express covenant or stipulations pertinent to the subject matter which they have agreed upon. The usual and ordinary covenants in such case on the part of the assignor are that the lease is good and valid, that he has power to assign his term, that he will protect the assignee from former grants and incumbrances and for quiet enjoyment. These covenants may also be properly contained in another instrument executed on a good consideration and delivered at the date of the delivery of the assignment of which it is then a part. These stipulations and covenants contained in assignments are subject to the same rules of interpretation and construction as are similar and analogous covenants contained in leases and other instruments. Thus a covenant by the assignor that the lease is in full force and effect and which guarantees the assignee the rights and title of the lessee is an express covenant of the assignor's title to the term demised and a covenant of quiet enjoyment in the assignee.<sup>74</sup> An express covenant by the assignor that he had good and lawful right to convey, that the premises were free from all arrears of rent and other incumbrances is a qualified covenant applicable only to the acts of the lessee and cannot be relied on where the assignee of the lease is evicted by the original lessor.<sup>75</sup> A covenant of warranty in an assignment of a lease which is limited to the right, title, and interest of the as-

<sup>73</sup> *Tobey v. Matimore*, 104 N. Y. Supp. 393.

<sup>74</sup> *Wetzell v. Richcreek*, 53 Ohio St. 62, 71, 40 N. E. Rep. 1004, also holding that the covenant is broken by the fact that the assignor being out of possession is unable to deliver possession of the premises by reason of a paramount title in another. The as-

signee is not required to attempt to procure possession of the premises but may sue for damages on the covenant without an offer to reassign or a tender back of the lease as the action is not for rescission but for failure of title.

<sup>75</sup> *Knickerbocker v. Killmore*, 9 Johns. (N. Y.) 106.

signor, does not make him liable to the assignee for rent, or to pay taxes subsequently accruing.<sup>76</sup> The assignor of a lease who has seen fit to restrict the use which his assignee may make of the premises by a covenant in the assignment may enforce the restriction against all persons who enter on the premises under the assignment. He may enforce it against an under-tenant of his assignee. This he may do though there was no covenant in his lease restricting the use which might be made of the premises.<sup>77</sup>

**§ 648. The assignee's covenants to indemnify the assignor.** It is competent and usually of great benefit to the lessee for the parties to insert in the assignment of the lease a covenant by the assignee that he will indemnify the assignor against liability for rent and against all breaches of covenants in the lease occurring during the term. Such a covenant will be construed according to the ordinary rules which are applicable to covenants of indemnity. A covenant by the assignee to indemnify the lessee against breaches of the lease will usually be restricted in its operation to breaches occurring while the assignee is in possession. The contrary must be expressly stipulated. Where in connection with a covenant by the assignee of a lease with his assignor that he will pay the rent so long as he is in possession, and he also covenants that he will at all times thereafter indemnify his assignor against liability for rent to the lessor is not confined to the time during which the assignee is in possession.<sup>78</sup> For there is no rule of law which will prevent the assignee, if he shall elect to do so for a valuable consideration from agreeing to hold the assignor harmless as against the lessor for any and all breaches of the lease which may happen during the term. An assignee of a lease who covenants with his assignor, who is also an assignee of the lessee, that he will indemnify his assignor from the "payment and performance" of the lessee's covenants is liable to his assignor on a covenant in the lease to repair, where the assignor had committed a breach of this covenant. In this case the lessor had notified the assignor to repair, which he neg-

<sup>76</sup> *Trask v. Graham*, 47 Minn. 571, 50 N. W. Rep. 917. As to the meaning of an express covenant against incumbrances in an assignment, see *Pease v. Christ*, 31 N. Y. 141.

<sup>77</sup> *Clements v. Welles*, 35 L. J.

Ch. 265, L. R. 1 Eq. 200, 11 Jur. (N. S.) 991, 13 L. T. 548, 14 W. R. 187.

<sup>78</sup> *Crossfield v. Morrison*, 7 C. B. 286, 18 L. J. C. P. 135, 13 Jur. 565.

lected to do and the lessor recovered damages against him. And it was held under this covenant that the assignee should indemnify the assignor for the damages which the lessor had recovered.<sup>79</sup> A covenant with his assignor by the assignee of the lessee that he will observe and perform all the covenants of the lease, and that he will indemnify the lessee against all claims and demands on account of the lease is a covenant of indemnity only. The lessee cannot enforce this covenant against his assignee until the lessor has taken proceedings and has procured a judgment against the lessee for a breach of a covenant in the lease. Hence, where the lease contained a covenant by the lessee that he would not repair without the consent of the lessor, the lessee cannot compel the assignee to perform this negative covenant specifically until he himself has been sued by the lessor for a breach of it.<sup>80</sup>

§ 649. **The effect of an assignment by the assignee.** The assignee of the lease, being liable to the lessor solely by reason of the privity of estate which exists between him and the lessor by reason of his acceptance of the assignment, is liable only for the obligations of the lease which mature, or for breaches which occur, while he holds his estate and continues to keep the possession as assignee. It follows therefore that he is not liable for breaches of covenants in the lease which occur after he has ceased to be an assignee.<sup>81</sup> Thus the assignee of the lease is liable for the rent which accrues while he is assignee but not for any rent which may have accrued prior thereto, and his liability for rent continues only so long as his privity of estate continues.<sup>82</sup> But

<sup>79</sup> Gooch v. Clutterbuck, 68 L. J. Q. B. 808, (1899) 2 Q. B. 148, 81 L. T. 9, 47 W. R. 609.

<sup>80</sup> Harris v. Boots Cash Chemists, 73 L. J. Ch. 708, (1904) 2 Ch. 376, 52 W. R. 668, 20 T. L. R. 623.

<sup>81</sup> Trask v. Graham, 47 Minn. 571, 573, 50 N. W. Rep. 917.

<sup>82</sup> Bonetti v. Treat, 91 Cal. 223, 230, 27 Pac. Rep. 612, 14 L. R. A. 151; Dengler v. Michelssen, 76 Cal. 125, 18 Pac. Rep. 138; Readey v. American Brewing Co., 60 Ill. App. 501; Hintze v. Thomas, 7 Md. 346,

351; Grundin v. Carter, 99 Mass. 15, 16; Dassori v. Zarek, 75 N. Y. Supp. 841; Clark v. Aldrich, 4 App. Div. 526, 40 N. Y. Supp. 440; Jaeques v. Short, 20 Barb. (N. Y.) 269, 274; Davis v. Morris, 36 N. Y. 569; Durand v. Curtis, 57 N. Y. 711; Astor v. L'Amoreux, 4 Sandf. (N. Y.) 524, 6 N. Y. Supp. 524; Carter v. Hammett, 18 Barb. (N. Y.) 608, 612; Childs v. Clark, 3 Barb. Ch. (N. Y.) 52; Van Rensselaer v. Jones, 2 Barb. (N. Y.) 643; Carter v. Hammett, 18 Barb. (N. Y.) 608; Siefke v.

he will be held liable for all rent which becomes due during existence of his privity of estate, though the beginning of the period for which the rent is payable precedes the date, on which he accepted the assignment. In such case the rent is not apportionable.<sup>83</sup> The same rule as to the assignee's liability for rent accruing during his occupation is applicable to the payment by him of taxes which his assignor had agreed to pay in the lease. The assignee unless she shall by express covenant with the lessor agree to pay him rent is not liable for rent accruing after his reassignment. And the assignee of a lease may, unless he is restrained from so doing escape all liability for the rent subsequently accruing, if he has not made himself personally liable therefor.<sup>84</sup> And it is not material to whom the assignee assigns for any assignment by him will relieve him from liability. He may assign to a beggar, a minor, a married woman, a prisoner or an insolvent or to a person out of the state. Such assignment releases him from rent provided he also surrenders possession because it destroys the privity of estate which existed between him and his landlord.<sup>85</sup> The assignee of the lease may, either on the

Koch, 31 How. Pr. 383; Hull v. Stevenson, 13 Abb. Pr. (N. S.) 196; Wright v. Kelley, 4 Lans. (N. Y.) 57.

<sup>83</sup> Trask v. Graham, 47 Minn. 571, 573.

<sup>84</sup> Readey v. American Brewing Co., 60 Ill. App. 501; Springer v. Chicago Real Estate Loan and Trust Co., 102 Ill. App. 294; McLean v. Caldwell, 107 Tenn. 138, 64 S. W. Rep. 16; Congregational Society v. Rix, (Vt. 89) 17 Atl. Rep. 719; Tibbals v. Iffland, 10 Wash. 451, 39 Pac. Rep. 102; Valiant v. Dodemedo, 2 Atk. 546; Chancellor v. Poole, 2 Doug. 764; Odell v. Wake, 3 Camp. 394. The assignee will not, however, be released from liability for rent accruing during his possession of the premises by an assignment to a third person. Consolidated Coal Co. of St. Louis v. Peers, 150 Ill. 344, 37 N. E. Rep. 937.

<sup>85</sup> McLean v. Caldwell, 107 Tenn. 138, 141, 64 S. W. Rep. 16; Johnson v. Sherman, 15 Cal. 287, 76 Am. Dec. 481. An assignee may assign the term to anyone for the purpose of getting rid of his liability without being responsible for fraud, though his assignee neither takes possession nor receives the lease. Taylor v. Shum, 1 Bos. & P. 21, 4 R. R. 759. In Kentucky by statute if the lessor acquiesces in his lessee's assignment the assignee is thereafter the lessee. The latter cannot then assign the lease so as to relieve his property from the lien of the lessor for rent, though accruing after the assignment, though the lessor cannot hold him personally liable. Myer Bros. Assignee v. Gaertner, 21 Ky. L. R. 53, 50 S. W. Rep. 974. An assignment by an assignee to another who takes under an assumed name is not void

acceptance of the assignment or subsequently thereto and upon an adequate and proper consideration assume the obligations of the lease or even different or greater obligations as respects the lessor. This he may do, either by express language or by necessary implication arising out of his silence or conduct. Where he thus assumes the obligations of the lease there is a privity of contract as well as privity of estate between the assignee and the original lessor and this contractual liability the assignee cannot avoid by an assignment.<sup>86</sup> An assignee of a lease who claims that he has released himself by a re-assignment has the burden of proof.<sup>87</sup>

**650. The liability of the assignor for the rent after an assignment.** In case a lease contains an express covenant which binds the lessee to pay rent the assignment of the lease, with the assent of the lessor, does not release the assignor from the express covenant to pay rent though the assignee expressly assumes all the covenants of the lease, and though the lessor subsequently to the assignment collects the rents accruing from the assignee.<sup>88</sup>

but passes a good title, terminates the assignor's liability to the landlord. *Hartman v. Thompson*, 104 Md. 389, 65 Atl. Rep. 117, citing cases as to assumed names.

<sup>86</sup> *Springer v. De Wolf*, 93 Ill. App. 260, affirmed in 194 Ill. 218, 62 N. E. Rep. 542. Taking an assignment "subject to the rents, covenants, conditions and provisions of the original lease," *Dassori v. Zarek*, 75 N. Y. Supp. 841, or "subject to the agreements therein mentioned to be performed by said lessee," *Peers v. Consolidated Coal Co. of St. Louis*, 59 Ill. App. 595, reversed in *Consolidated Coal Co. of St. Louis v. Peers*, 166 Ill. 361, 46 N. E. Rep. 1105, does not render the assignee personally liable on the covenant to pay rent for rent accruing after he has assigned. No contract is created by the words "subject to" as they are merely words of description.

<sup>87</sup> *Hartman v. Thompson*, 104 Md. 389, 65 Atl. Rep. 117.

<sup>88</sup> *Bonetti v. Treat*, 91 Cal. 223, 229, 27 Pac. Rep. 612, 14 L. R. A. 151; *Salisbury v. Shirley*, 66 Cal. 223, 5 Pac. Rep. 104; *Dietz v. Kucks* (Cal.), 45 Pac. Rep. 832; *Wilson v. Lunt*, 11 Colo. App. 56, 52 Pac. Rep. 296; *Wilson v. Gerhardt*, 9 Colo. 585, 13 Pac. Rep. 705; *Babcock v. Scoville*, 56 Ill. 461; *Bradley v. Walker*, 93 Ill. App. 609; *Hoerdt v. Hahne*, 91 Ill. App. 514; *Grommes v. St. Paul Trust Co.*, 147 Ill. 634, 35 N. E. Rep. 820; *Rector v. Hartford Deposit Co.*, 102 Ill. App. 554; *Consolidated Coal Co. of St. Louis v. Peers*, 150 Ill. 344, 37 N. E. Rep. 937, affirming 39 Ill. App. 455; *Barnes v. Northern Trust Co.*, 169 Ill. 112, 48 N. E. Rep. 31, affirming 66 Ill. App. 282; *Springer v. Chicago Real Estate, Loan and Trust Co.*, 202 Ill. 17, 66 N. E. Rep.

Thus the consent to an assignment given by the landlord where it is given solely to prevent a forfeiture does not release the lessee from his liability on the covenants of the lease.<sup>89</sup> The receipt by the lessor of rent from an assignee of a lease who has expressly covenanted to pay the rent does not discharge the lessee from his express contract to pay rent for it is nothing more than accepting the payment of the rent from the assignor through the hands of another person.<sup>90</sup> The assignor of the lease is primarily liable to the lessor on his covenant for the rent as it accrues subsequently to the assignment, and the assignor continues liable as a surety of the assignee unless the landlord in fact accepts a surrender from the assignor or enters into an express stipulation releasing him from liability.<sup>91</sup> Not only is the

850, affirming 102 Ill. App. 294; Heller v. Dailey, 63 N. E. Rep. 490; Jordan v. Indianapolis Water Co., 159 Ind. 337, 64 N. E. Rep. 680, reversing 61 N. E. Rep. 12; Fletcher v. McFarlane, 12 Mass. 43; Wall v. Hinds, 4 Gray (Mass.) 256; Greenleaf v. Allen, 127 Mass. 248; Farrington v. Kimball, 126 Mass. 313, 314; Whetstone v. McCartney, 32 Mo. App. 430; Charless v. Froebel, 47 Mo. App. 45; Jones v. Barnes, 45 Mo. App. 590; Hunt v. Gardner, 39 N. J. Law, 530; Gerken v. Smith, 11 N. Y. Supp. 685, 34 N. Y. St. Rep. 59; Ranger v. Bacon, 3 Misc. Rep. 95, 22 N. Y. Supp. 551; Armstrong v. Wheeler, 9 Cow. (N. Y.) 88; Frank v. N. Y. L. E. & W. R. Co., 7 N. Y. St. Rep. 814; Harmony Lodge v. White, 30 Ohio St. 569; Ghegan v. Young, 23 Pa. St. 18; Lloyd v. Cozens, 2 Ash. (Pa.) 131; Almy v. Green, 13 R. I. 350; Adams v. Burke, 21 R. I. 126, 42 Atl. Rep. 515; Lovejoy v. McCarty, 94 Wis. 341, 68 N. W. Rep. 1003; compare Tyler's Estate v. Giesler, 74 Mo. App. 543. An allegation that a lessor assigned his lease that the lessor received the rent

from the assignee and accepted him as tenant does not show a surrender. Creveling v. De Hart, 54 N. J. Law, 338, 23 Atl. Rep. 611.

<sup>89</sup> Gilsey v. Keen, 185 N. Y. 588, 78 N. E. Rep. 1104, affirming without opinion 93 N. Y. Supp. 783, 104 App. Div. 427, 629.

<sup>90</sup> Brewer v. Dyer, 7 CUSH. (Mass.) 337; Bedford v. Terhune, 30 N. Y. 353; Durand v. Curtis, 57 N. Y. 7, 15; Adam v. Burke, 21 R. I. 126, 42 Atl. Rep. 515.

<sup>91</sup> Wilson v. Gerhardt, 9 Colo. 585, 13 Pac. Rep. 705; Hoerdt v. Hahne, 91 Ill. App. 514; Barnes v. Northern Trust Co., 48 N. E. Rep. 31, 169 Ill. 112, 66 Ill. App. 282; Collins v. Pratt, 181 Mass. 345, 63 N. E. Rep. 946; Charless v. Froebel, 47 Mo. App. 45; Latta v. Weis, 131 Mo. 230, 32 S. W. Rep. 1005; Whetstone v. McCarthy, 32 Mo. App. 43; McLean v. Caldwell, 107 Tenn. 138, 64 S. W. Rep. 11. The fact that the lessor demised other premises to the assignee does not affect the liability of an assignor where the assignment is taken upon the express condition that the assignor is to continue

lessee primarily liable on the covenant to pay rent but his surety still continues liable for a default subsequent to the assignment and is not discharged by an assignment or by the acceptance of rent of the assignee by the assignor, unless a new lease or a surrender is shown.<sup>92</sup> But where the obligation of the original lessee to pay rent is only that which is implied by the law from the privity of estate which is created by his occupation of the premises under an assignment, his subsequent assignment, though without the assent of the lessor, extinguishes this privity which existed between him and the lessor and he is no longer liable primarily or as a surety for the payment of the rent by his assignee.<sup>93</sup> The lessor may sue either the original lessee or his assignee for rent accruing while the assignee holds possession. He may sue one or both at the same time but he can collect only from one.<sup>94</sup>

liable. *Miller v. Hawes*, 58 Ill. App. 667.

*McBee v. Sampson*, 66 Fed. Rep. 416.

<sup>92</sup> *Grommes v. St. Paul Trust Co.*, 147 Ill. 634, 35 N. E. Rep. 820; *Bradley v. Walker*, 93 Ill. App. 609; *Oswald v. Fratenburgh*, 36 Minn. 270, 31 N. W. Rep. 173; *Morgan v. Smith*, 70 N. Y. 537, 544; *Way v. Reed*, 6 Allen (Mass.) 364; *Oswald v. Fratenburgh*, 36 Minn. 270, 31 N. W. Rep. 17; *Hunt v. Gardner*, 39 N. J. L. 530; *Danby v. Hoffman*, 3 E. D. Smith (N. Y.) 361; *Almy v. Green*, 13 R. I. 350, 353. A guarantor of the payment of rent even though his guarantee is not incorporated in the written lease, may if his undertaking is indorsed on it, be sued jointly with the debtor. *Lucy v. Wilkins*, 33 Minn. 21, 21 N. W. Rep. 849; following *Hammel v. Beardsley*, 31 Minn. 314, 17 N. W. Rep. 858.

<sup>93</sup> *Springer v. Chicago R. E. Loan & Trust Co.*, 102 Ill. App. 294; *Harmony Lodge v. White*, 30 Ohio St. 569; *Ghegan v. Young*, 23 Pa. St. 18; *Tibbals v. Iffland*, 10 Wash. 451, 39 Pac. Rep. 102;

<sup>94</sup> *Whetstone v. McCartney*, 32 Mo. App. 430. An assignment of a lease by an assignee will rid him of liability for the rent though made without the knowledge or assent of his lessor. *Tibbals v. Iffland*, 10 Wash. 451, 39 Pac. Rep. 102. An assignor of a lease who has expressly guaranteed the payment of the rent by the assignee is not entitled to notice of default of the latter to pay the rent. *Georgen v. Schmidt*, 69 Ill. App. 538. The lessor by suing the assignee on a covenant in the lease for the rent does not thereby waive his right to sue the assignor. Particularly if he does this by the assignor's request his action does not amount to an acceptance of the assignee as his lessee. *Whitcomb v. Cummings*, 68 N. H. 67, 38 Atl. Rep. 503. The lessee can recover damages accruing to him from a breach of the lease before he assigned it and he may bring an action for the same after the assignment.

**§ 651. The liabilities and rights of an under tenant as regards the original lessor.** No privity either of contract or of estate exists between the original lessor and a sublessee which will enable the original lessor to enforce any covenant of the original lease as against the sublessee.<sup>95</sup> Hence the under tenant is not liable to the original lessor under any covenant running with the land.<sup>96</sup> The under tenant is not, in the absence of stat-

Cleveland C. C. & St. Ry. Co. v. Wood, 189 Ill. 352, 59 N. E. Rep. 619. The assignee may dispute the title of his assignor. Jeffers v. Easton Eldridge & Co., 113 Cal. 345, 45 Pac. Rep. 680. "The right of a lessor to demand and receive rent from the assignee of the lessee is not a right founded on privity of contract, but on privity of estate. To support it, there must be, not an under-letting, but an assignment of the whole estate of the lessee, and then the covenant to pay rent is a covenant which runs with the land. But as the rent is an incident of the reversion, if the lessor assigns or otherwise conveys his reversion, he cannot have any claim for rent subsequently accruing; but the right to the rent is transferred to his assign. The assign of the lessee is only answerable upon the covenants in a lease while he is an assign, and the lessor can only enforce them against him while he continues to own the reversion. Though the tenant or his assigns cannot deny his landlord's title under which the demise was made, yet he may show that it has terminated, upon transfer or otherwise been extinguished." Grundin v. Carter, 99 Mass. 15.

<sup>95</sup> Van Rensslear v. Jones, 2 Barb. (N. Y.) 643; Kain v. Hoxie, 2 Hilt. (N. Y.) 11; Jennings v.

Alexander, 1 Hilt. (N. Y.) 154; Coles v. Marquand, 2 Hill (N. Y.) 47; Harvey v. McGrew, 44 Tex. 412, 415.

<sup>96</sup> Doty v. Heith, 57 Miss. 532, 535; Lee v. Payne, 4 Mich. 106; St. Joseph & St. L. R. Co. v. St. Louis I. M. & S. Ry. Co., 102 Mo. 173, 36 S. W. Rep. 602. In Georgia the lessor may elect to treat the subtenant as his lessee. He may distrain against him for rent due from the first lessee and seize his crop, though the subtenant has given his note for his rent to his lessor. Barlow v. Jones, 117 Ga. 412, 43 S. E. Rep. 690. The lien of the original lessor for rent attaches to the crop raised on the land by a subtenant. If the latter, to protect himself against paying double rent, voluntarily applies the proceeds of his crop to the payment of the rent which is due by the principal tenant to the original lessor, he is discharged so far as his own obligation to pay rent to the principal tenant exists, to the extent that the amount thus applied pays off the rent which he may owe to his own lessor. Thompson v. Commercial Guano Co., 93 Ga. 282, 20 S. E. Rep. 309. But the subtenant in Georgia does not become the tenant of the original lessor until the latter has elected to treat him as such. The original lessor by statute has a lien for

ute liable to the original lessor for rent unless by contract express or to be implied from circumstances such as a surrender and attornment by the under tenant, for the reason that there is neither privity of estate nor of contract between the lessor and the under tenant.<sup>97</sup> Where an original lessor takes a surrender of his lessee subject to the rights of the subtenant of the latter and takes an assignment of the subleases which he confirms, and promises to respect, the privity of contract is transferred to him and the original lessor may recover rent from the subtenants though the latter no longer occupy the premises.<sup>98</sup> So the acceptance by the assignee of a lease, of rent from a subtenant estops him from denying the continuance of the subtenancy.<sup>99</sup> But a provision in the original lease that upon a re-entry by the lessor the subleases should belong to him does not create a privity between the original lessor and the subtenants which will enable the latter to hold as tenants of the original lessor or render them

rent upon the crops grown upon the land which is never defeated by a subletting. *Hudson v. Stewart*, 110 Ga. 337, 35 S. E. Rep. 178. In Missouri, by statute, subtenants are liable to the original lessor to the same extent as an assignee of the lease at common law. *Garranette v. White*, 92 Mo. 237, 4 S. W. Rep. 681; *Hicks v. Martin*, 25 Mo. App. 359; *Hulett v. Stockwell*, 27 Mo. App. 328. They are as much bound to pay rent and are as subject to the landlord's lien as though they were his tenants. *Phillips v. Burrows*, 64 Mo. App. 351.

<sup>97</sup> *Simmons v. Simmons*, 46 Ala. 304; *McDonald v. May* (Mo. App.), 69 S. W. Rep. 1059; *Holman v. De Lin River Finley Co.*, 31 Oreg. 428, 47 Pac. Rep. 708; *Harvey v. McGrew*, 44 Tex. 412, 415; *Fulton v. Stuart*, 2 Ohio, 215, 15 Am. Dec. 542; *Davis v. Morris*, 31 N. Y. 569; *McFarlan v. Watson*, 3 N. Y. 286; *Jackson v. Davis*, 5 Cow.

(N. Y.) 123, 15 Am. Dec. 451; *Marshall v. Lippman*, 16 Hun (N. Y.) 110; *Austin v. Thompson*, 45 N. H. 113; *Doty v. Heth*, 52 Miss. 530, 532; *Robinson v. Lehman*, 72 Ala. 401; *Carver v. Palmer*, 33 Mich. 342; *Doty v. Gillett*, 43 Mich. 203, 5 N. W. Rep. 89; *Fisher v. Pforzheimer*, 93 Mich. 650, 53 N. W. Rep. 828; *Williams v. Michigan Cent. R. Co.*, 95 N. W. Rep. 708, 10 Det. Leg. N. 238; *Giddings v. Felker*, 70 Tex. 176, 7 S. W. Rep. 694; *Shannon v. Grindstaff*, 11 Wash. St. 536, 539, 45 Pac. Rep. 123. In Georgia the original lessor may recover the rent directly from the subtenant. *McConnell v. East Point Land Co.*, 100 Ga. 129, 28 S. E. Rep. 80.

<sup>98</sup> *Beal v. Boston Car Spring Co.*, 125 Mass. 159, 28 Am. Rep. 216; compare *Williams v. Michigan Cent. R. Co.*, 10 Det. Leg. N. 238, 95 N. W. Rep. 708.

<sup>99</sup> *Cuschner v. Westlake*, 43 Wash. 690, 86 Pac. Rep. 948.

liable for rent to him.<sup>1</sup> Where a subtenant acquires the reversion of the premises, the sublease and its conditions are merged and extinguished and he holds the fee of the premises upon the same terms and conditions as though the sub-lease had never been made.<sup>2</sup> A subtenant who by his own default brings about a forfeiture of the term of his landlord and afterwards procures for himself a lease for the remainder of the term from the original lessor holds this term in trust for his landlord, the former original lessee.<sup>3</sup> Where a tenant who is bound by his lease to repair, under-lets the premises to a person who also agrees to repair, and the under-tenant fails to keep his agreement by reason of which the original landlord recovers damages from the original tenant, the latter may in turn recover from his tenant the same damages and costs, together with his expense in defending the action.<sup>4</sup> A person who in good faith and relying on the representations of a tenant that he would be permitted to enjoy the possession subleases land leased by the tenant has an action against the latter, when the tenant subsequently induces the original landlord to dispossess the subtenant on the ground that he had never given his consent in writing to the subletting as required by the lease. Particularly would this be the case when the subtenant is ousted after it has become too late for him to get other land.<sup>5</sup> Where a yearly tenancy has subsisted between a tenant for years and his under-tenant, it is no legal objection to the continuance of that tenancy that the term of the tenant for years has run out and that he continues to hold of the superior landlord as a tenant from period to period for a term less than a year. If the under tenant continues to occupy without any new agreement he will be taken to have occupied as a yearly tenant.<sup>6</sup>

<sup>1</sup> Williams v. Michigan Cent. R. Co., 10 Det. Leg. N. 238, 95 N. W. Rep. 708, 709. A landlord owes no duty to a subtenant occupying contrary to a prohibition in the lease against subletting to keep the premises in a safe condition for his use, or for the use of others there by his invitation. Cole v. McKey, 66 Wis. 500.

<sup>2</sup> Wahl v. Barroll, 8 Gill. (Md.) 288, 294.

<sup>3</sup> Thomas v. Zumbalen, 43 Mo. 471.

<sup>4</sup> Neale v. Wyllie, 5 D. & R. 442, 3 B. & C. 533, 27 R. R. 418.

<sup>5</sup> Calvert v. Hobbs, 107 Mo. App. 7, 80 S. W. Rep. 681.

<sup>6</sup> Pearce v. Shard, 6 L. J. (O. S.) K. B. 354.

§ 652. The knowledge of an under tenant of the covenants and agreements which are binding on his lessor. Though at the common law there is no privity between the original landlord and an undertenant from which it results that the landlord cannot at law enforce any of the covenants in the primary lease against an undertenant until he has accepted him as a tenant in equity the rule is otherwise. The doctrine of equitable notice is relied upon to protect the interest of the original landlord against the wrongful conduct of the undertenant where the legal remedy is inadequate. In equity the subtenant is chargeable with knowledge of all the covenants in the original lease even though it has not been recorded and even though he has not actual knowledge of the covenants of the lease.<sup>7</sup> The sublessee before he has accepted the sublease has a right to inspect the original lease.<sup>8</sup> Where a lessee covenants in an under lease to observe the covenants of the original lease, it is the same as if those covenants had been inserted in full in the under lease and he is bound in law to his own lessor on all of those covenants.<sup>9</sup> And if he finds a lessee in possession and fails to inspect the instrument under which he holds, he will be presumed to have such knowledge of the contents of that instrument that he will be bound by it so far as a breach of its covenants by his lessor will affect his title and interest as a subtenant. Thus the subtenant is bound by a condition or a covenant in the original lease forbidding the use of the premises for a particular purpose as, for example, the sale of intoxicating liquors.<sup>10</sup> Where the original lease gives the original lessor a lien for rent on certain personal property and on crops to be grown on the premises the crops subsequently grown by the subtenant are chargeable with the lien.<sup>11</sup>

<sup>7</sup> Foster v. Reid, 78 Iowa, 205, 42 N. W. Rep. 649, 16 Am. St. Rep. 437; Blackford v. Frenzer, 44 Neb. 829, 62 N. W. Rep. 1101, 1103; Peer v. Wadsworth (N. J. 1904), 58 Atl. Rep. 379; Eten v. Luyster, 60 N. Y. 252, 258; Goddard's Appeal, 1 Walk. (Pa.) 97; Anderson v. Miller, 96 Tenn. 35, 33 S. W. Rep. 615; Missouri, Ky. & T. Ry. Co. v. Keahey (Tex. 1904), 83 S. W. Rep. 1102; Shannon v. Grindstaff, 11 Wash. St. 536, 40 Pac. Rep. 123;

Flight v. Barton, 3 Myl. & K. 282; Cosser v. Collinge, 3 Myl. & K. 283, 1 L. J. Ch. 130.

<sup>8</sup> Gosling v. Wolf, 5 Reports, 12 B. 39, 68 L. T. 89, 41 W. R. 106, 81, (1893) 1 Q. B. 39.

<sup>9</sup> Piggott v. Stratton, 1 De G. R. & J. 33, 29 L. J. Ch. 1, 6 Jur. (N. S.) 129, 1 L. T. 111, 8 W. R. 13.

<sup>10</sup> Stees v. Kranz, 32 Minn. 313, 316, 20 N. W. Rep. 241.

<sup>11</sup> Foster v. Reid, 78 Iowa, 205,

A sub-lessee will be presumed to have notice when he goes in possession of all the provisions of the lease. He takes subject to the cancellation of his lessor's lease under a clause giving the original lessor the right to cancel it on a certain event happening.<sup>12</sup> It is particularly the duty of a person taking a sub-lease, to ascertain how long the term of his lessor has to run. If therefore he shall without investigating his lessor's title, accept a lease which exceeds the term of his lessor, he cannot in the absence of an expressed provision claim compensation. It was his duty to have discovered his lessor's lack of power, before he took the under lease which he might readily have done by inspecting the original lease.<sup>13</sup> If he fails to inspect the original lease which he has a right to do and even though he acted without professional advice he is without a remedy in equity. Nor could he claim compensation if the making of the under lease for a longer term than the original lease, was the result of a fraud on the part of the lessor if the fraud did not actually prevent the under tenant from examining the original lease.<sup>14</sup> Where the original lease forbade the storage of cotton in the premises a sub-tenant who stores cotton therein is liable with his lessor for damages by fire which have been caused thereby though his own lease permitted him to store cotton in the building.<sup>15</sup>

**§ 653. The nature and operation of a mortgage of the lessee.** At common law, in the absence of any restriction in the lease upon the power of the lessee to mortgage his term, or to assign it by way of security, the lessee has full power to mortgage his term. He may create a valid lien to be secured by a mortgage upon his interest and right to possession under the lease so far

42 N. W. Rep. 649. See, also, *Giddings v. Felker*, 70 Tex. 176.

<sup>12</sup> *Cuschner v. Westlake*, 43 Wash. 690, 86 Pac. Rep. 948. It is the duty of the undertenant to inform himself of the contents of the original lease. *Cosser v. Collinge*, 3 My. & K. 283. *Grosvenor v. Green*, 32 L. T. Rep. (O. S.) 252, 28 L. J. Ch. 173. The subtenant has constructive notice of the provisions of the original lease

only, when he has had a fair opportunity to ascertain what they were. *Hyde v. Warden*, 37 L. T. 567, 3 Ex. Div. 72, 47 L. J. Ex. 121, 26 W. R. 201.

<sup>13</sup> *Clayton v. Leech*, 41 Ch. D. 103, 61 L. T. 69, 37 W. R. 663.

<sup>14</sup> *Besley v. Besley*, 9 Ch. D. 103, 38 L. T. 844, 27 W. R. 184.

<sup>15</sup> *Anderson v. Miller*, 96 Tenn. 35, 33 S. W. Rep. 615.

as the term has not expired. His mortgage of his lease does not of course constitute an incumbrance on the reversion.<sup>16</sup> Inasmuch as a lease for life or for years is almost universally regarded as personal property, it may be stated that such mortgages are generally regarded as chattel mortgages. Owing also to the fact that they apply to interests in personal property the duration of which is necessarily limited they are of value only while the term endures and consequently can not be foreclosed after the lease has expired by its own limitation.<sup>17</sup> The lien of a mortgage upon a leasehold has no longer duration than the end of the term which is mortgaged. Nor is the lien extended merely by the fact that the lessee has permitted the mortgagee to enter into the actual possession of the premises for the mortgagee cannot possibly acquire any greater rights than are possessed by the lessee.<sup>18</sup> The personal property which has been pledged by way of mortgage, that is to say the interest of the lessee in the term, having ceased to exist by reason of the expiration of the term, a court of equity, in case the foreclosure of the mortgage is sought, will not decree the idle ceremony of a sale.<sup>19</sup> The general principle that a deed absolute upon its face may be shown to be a mortgage by parol evidence, is applicable to an absolute conveyance of a leasehold interest. Thus an absolute assignment of a lease by the lessee for the purpose of securing the payment of a loan to him, or as security for any other purpose, though absolute in form is in its nature merely a chattel mortgage. Hence its true character may be shown by parol evidence.<sup>20</sup> The mortgagee of a leasehold or an assignee of a leasehold by way of security is not, as against the lessee, entitled to the possession of the premises until the default of the lessee or other person to secure whose debt the mortgage or assignment was made.<sup>21</sup> This is the rule in those states where the equitable principle is recog-

<sup>16</sup> Harman v. Allen, 11 Ga. 45. As to the power of a lessee to mortgage if his lease permits him to sublet, see Menger v. Ward, 28 S. W. Rep. 821, 87 Tex. 622, 30 S. W. Rep. 853.

<sup>17</sup> Rogers v. Herron, 92 Ill. 582, 589.

<sup>18</sup> Miller v. Warren, 182 N. Y. 539, 75 N. E. Rep. 1131, affirming

94 App. Div. 192, 87 N. Y. Supp. 1011.

<sup>19</sup> Conn. v. Tonner, 86 Iowa, 581, 587.

<sup>20</sup> Jackson v. Green, 4 Johns. (N. Y.) 186.

<sup>21</sup> Engels v. McKinley, 5 Cal. 153; Adams v. Smith, 19 Nev. 259, 272, 9 Pac. Rep. 337.

nized that the mortgagee of real property is not entitled to claim any legal interest in, or title to, or possession of such real property until the equity of redemption is foreclosed. The mortgagee or assignee of a leasehold by way of security is not in privity with the lessor and is under no liability to the lessor by reason of the mortgage,<sup>22</sup> until he has actually entered upon the possession and occupation of the premises and has received the rents and profits of the same.<sup>23</sup> He is by his entry into possession regarded by the law as an assignee. As has been pointed out, even though an instrument in express terms is an absolute conveyance of all the interest of the lessee in the term, it will be, both at law and in equity, regarded merely as a security for the debt and it will pass no legal estate to the mortgagee. Even after condition is broken, the mortgagee of a leasehold, not being in actual possession is not regarded as an assignee or considered to be in such privity with the lessor as will render him liable upon the covenants of the lease.<sup>24</sup> It has been held, however, that after forfeiture of the term by the mortgagor by which the whole legal estate becomes vested in the mortgagee, he is then in the position of an assignee of the lease and is liable to the lessor upon all the covenants whether in the possession of the premises or not.<sup>25</sup> Hence where a mortgagee, or an assignee of a lease by way of security for the indebtedness of the lessee, goes into possession of the demised premises, he at once becomes responsible to the lessor for the rents and profits of the same. He must also exercise such care and diligence in respect to the property as would usually be exercised by a careful owner and for his failure to do this he will be liable to the lessee as well as to the lessor. He can not, unless expressly authorized to do so, sell the term at private sale for until foreclosure he has no

<sup>22</sup> A contractor who takes an assignment of a lease as collateral security and enters upon the premises, merely for the purpose of making repairs, is not liable for rent to the landlord. *Tallman v. Bresler*, 65 Barb. (N. Y.) 369; affirmed in 56 N. Y. 635.

<sup>23</sup> *Johnson v. Sherman*, 15 Cal. 287, 76 Am. Dec. 481; *McKee v. Angelrodt*, 16 Mo. 283; *Astor v. Miller*, 2 Paige (N. Y.) 68; *Tall-*

*man v. Bresler*, 65 Barb. (N. Y.) 369; *Engels v. McKinley*, 5 Cal. 153.

<sup>24</sup> *Worthington v. Ballauf*, 6 Ohio Dec. 1121, 7 Wkly. Law Bul. 46, 10 Am. Law Rec. 505.

<sup>25</sup> *Mayhew v. Hardesty*, 8 Md. 479. See, *Kearney v. Post*, 1 Sandf. (N. Y.) 105, as to the liability of a purchaser at a sale under foreclosure of a mortgage on a lease.

legal interest. One who with knowledge purchases the term from a mortgagee of a leasehold is upon entry in merely as a mortgagee wrongfully in possession and chargeable as such.<sup>26</sup> A mortgage by an assignee of a lease which expressly conveys all his interest in the term and in certain structures and fixtures now on the land or hereafter to be placed thereon does not cover chattels subsequently placed upon the land by the assignee of the mortgagor. As between the mortgagor or his assignee and the mortgagee the mortgage on being filed by the latter as required by statute is constructive notice and operates to create a lien in equity in favor of the mortgagee as to all chattels placed upon the premises by the mortgagor prior to the mortgage. If the assignee of the mortgagor had contracted with either the mortgagor or mortgagee that the mortgage lien should attach to any chattels they may place upon the land the question would be without any difficulty. But inasmuch as the assignee is not except by express contract liable on any express agreement which has been entered into by his assignor he can not be held on any express stipulation in the mortgage to which instrument he was in no wise a party. The assignee neither assumed nor agreed to pay the mortgage and did not, except constructively, know of its existence and is only bound by such covenants as run with the land.<sup>27</sup> If the assignment though in fact a security for a debt merely provides that upon the condition that the assignor shall pay the assignee a sum specified then the assignment to be void but otherwise the assignee may sell the term and out of the proceeds pay himself the assignee cannot bring an action to recover the money on an implied covenant. There is no express covenant to pay and the only remedy of the assignee is to sell the lease under the power.<sup>28</sup> A mortgagee of a leasehold may pay the rent due under the lease and also the taxes which the lessee was bound to pay where an assignee neglects to do so. The mortgagee may do this to protect himself in case a lessee or assignee of a lessee fails to do so, and the lessor is about to re-enter the premises for the default of the assignee or lessee. He is not a

<sup>26</sup> North Chicago St. R. Co. v. Le Grand Co., 95 Ill. App. 435, 461. <sup>27</sup> Kribbs v. Alford, 120 N. Y. 519, 525, 24 N. E. Rep. 811.

<sup>28</sup> Salisbury v. Philips, 10 Johns. (N. Y.) 57.

mere stranger making a voluntary payment but has a vital interest in preserving the lease which is his security and consequently by doing this he becomes an equitable assignee of the rights of the lessor against the lessee is subrogated to his rights and may maintain at law the same action that the lessor can maintain.<sup>29</sup>

**§ 654. The assignment of a lease as security.** It is competent for the lessor to assign his interest in the lease, or his right to collect the rents, separately from the reversion, as security for the payment of a debt. The lessee, after receiving notice of the assignment is bound to pay his rent to the assignee on demand as it accrues until the debt is paid but no longer. The assignment is not however absolute and irrevocable. It does not pass an absolute title to the lease to the assignee. If such be the agreement of the parties to the assignment, the assignee, who is practically only a pledgee, may collect the rent from the lessee and credit it on the debt which is due him from the lessor. If for any reason the assignor pays or tenders the balance due, he is entitled to have his lease returned as it is a security merely which the assignee or pledgee is entitled to hold only until he is paid. If the pledgee refuses to return the written instrument the lessor should notify the lessee of the satisfaction of the debt and of the extinguishment of the rights of the pledgee or assignee and the lessor, after such notice and demand may recover from the lessee on the covenants in the lease,<sup>30</sup> provided however that the lessor shall account for the non-production of the lease. An order by a landlord upon his tenant directing him to pay a creditor of the landlord the rent as it becomes due is an assignment of the rent. Its acceptance by the tenant binds him to pay the rent to the creditor direct and makes him the debtor in place of the landlord. The creditor may enforce this liability in his own name. The contract between the creditor and the tenant is based upon a valid consideration.<sup>31</sup>

**§ 655. The renewal of a lease for the benefit of a mortgagee.** The equitable principle that where a tenant or any person hav-

<sup>29</sup> Dunlop v. James, 174 N. Y. 411, 416, 67 N. E. Rep. 607. <sup>31</sup> Esling v. Zantzinger, 13 Pa. St. 50, 52.

<sup>30</sup> Hendershott v. Calhoun, 17 Ill. App. 163, 165.

ing a special interest in a lease obtains a renewal of the lease from the fact of his being in possession as a tenant, or from his having a particular or special interest, to renew it the renewed lease will be regarded merely as a continuation of the original lease is applied to the case of a renewal of a lease by the lessee after he has mortgaged the lease. In such case the expiration of the term which has been mortgaged will not have its usual and ordinary effect in rendering the mortgage worthless because of the destruction of the thing mortgaged. The renewed lease will inure to the benefit of the mortgagee of the original lease and the tenant will not be permitted to defeat the lien of the mortgage by a surrender of the lease and the execution of a new one. This rule is wholly of equitable origin and is based upon the fact that the party who obtains the lease does so by reason of the position he occupies in respect to the premises, *i. e.*, by being in possession of them and having the good will which accompanies it or being connected with the lease in some way and by the fact that he could by a surrender of the lease and a renewal take an unfair and inequitable advantage of the mortgagee of the lease.<sup>32</sup> So on the other hand if a mortgagee of a leasehold secures from the lessor a renewal of the lease in his own name or any other advantage because of his position as a mortgagee of the lease the renewal will inure to the benefit of the mortgagor and he will be entitled to redeem the new lease to the same extent and upon the same conditions as the old.<sup>33</sup>

**§ 656. The liability of an equitable mortgagee or assignee to the lessor.** The question whether one who is merely an equitable mortgagee or assignee of a lease is liable on its covenants to the lessor has been much debated. It is very clear that as between him and the lessor there is no more privity of interest than there is between the legal assignee and the lessor. In some of the cases the fact that the equitable assignee or mortgagee had taken possession of the premises and had occupied and derived benefit from their possession, was considered to give the lessor a claim against him and to place him under the

<sup>32</sup> Wunderlich v. Reis, 34 Hun (N. Y.) 1, 3; Holdridge v. Gillespie, 2 Johns. Ch. (N. Y.) 30; Phyfe v. Wardell, 5 Paige (N. Y.) 279; and see on the general rule

as to renewals, Mitchell v. Read, 61 N. Y. 123.

<sup>33</sup> Slee v. Manhattan Co., 1 Paige (N. Y.) 48.

obligation of performing the covenants of the lease. It would seem reasonable that if the equitable assignee takes possession, he should pay for what he receives, and whether he pays for use and occupation or pays rent under the lease is not material. On the other hand, inasmuch as an assignee of a lease is liable at law though he does not take possession, it has been considered that the failure of the equitable assignee or mortgagee to take possession would still leave him liable to pay rent. So it has been held as a general proposition that an equitable assignee is liable for all breaches of the lease, which occur during the time he continues to be such assignee.<sup>34</sup> Thus, to illustrate, a person who contracted to purchase a lease, may be held liable by the lessor where he fails to pay the rent during the term which the lessee is compelled to pay, even though it was expressly stipulated that he was not to have a legal assignment of the lease. In equity his rights are that of an assignee and he must accept the obligations which are co-extensive with his rights. If he had the legal assignment, his assignor would have been his surety and entitled to call on him for indemnity in case he failed to perform the covenants of the lease. The same rule applies in equity.<sup>35</sup> His liability however, in equity is that of a promisor under a simple contract to which the statute of limitations is applicable, restricting it to six years.<sup>36</sup> Recognizing the difficulty of giving a lessor damages against an equitable assignee for a breach of covenant, in a suit in equity it has been held that the proper relief would be for equity to decree that the assignee shall take a written assignment and that the lessor may then pursue his legal remedy against him.<sup>37</sup> And in one case it was held that an equitable assignment though followed by possession on the part of the assignee, gave the lessor no remedy against him in equity on the

<sup>34</sup> The Court of Equity has invented an equitable privity of estate between the equitable assignee and the lessor. Jenkins v. Portman, 1 Keen, 435, 5 L. J. Ch. 313; London City v. Richmond, Pre. Ch. 156, 2 Vern. 421; Close v. Wilberforce, 1 Beav. 112, 8 L. J.

Ch. 101, 3 Jur. 35; Wilson v. Leonard, 3 Beav. 373.

<sup>35</sup> Close v. Wilberforce, 1 Beav. 112, 8 L. J. Ch. 101, 3 Jur. 35.

<sup>36</sup> Sanders v. Benson, 4 Beav. 350.

<sup>37</sup> Lucas v. Comerford, 3 Bro. C. C. 166, 1 Ves. J. 235. But see 8 Sim. 499.

covenants in the lease.<sup>38</sup> The rules that have just been stated have been held to be applicable to a mortgagee of a leasehold estate. The mortgagee differs from the equitable assignee in that the former has the legal title to the lease and is in all respects a legal assignee. There is between him and the lessor the same privity of estate as exists between an absolute assignee of a lease and the lessor. It is therefore not important that the mortgagee never had possession of the premises. This view of the matter is, however, correct only where the theory that the mortgagee is the legal owner in fact, as well as in law, is recognized and accepted.<sup>39</sup> If the equitable theory of mortgages be recognized by which it is considered that the mortgagor continues to be the legal owner, and which regards the debt as the principal thing, then it is absurd to hold the mortgagee responsible for the payment of the rent and the performing of the covenants to repair, particularly if he has not derived any benefit from the use of the premises. Hence it has been held in several cases that the lessor cannot compel the mortgagee to pay rent unless the latter actually has entered into possession.<sup>40</sup> We must now consider the relation of an equitable mortgagee of a lease to the owner. By equitable mortgagee is meant a person who takes a deposit of the written lease as a security for some debt or obligation owing him by the lessee. An equitable assignee is usually a person who has contracted to take an assignment of the lease, and who is regarded as an assignee having equitable rights only until he requires the legal title. By one or two of the earlier cases in England, it was held that an equitable mortgagee of a lease was liable to the lessor on the covenants of the lease and must account to the lessor for the rent, which the lessee had omitted or refused to pay. This was so even though the equitable mortgagee had not taken possession of the premises. This startling decision so unjust in its character, and which was based upon a case,<sup>41</sup> which did not at all justify

<sup>38</sup> Cox v. Bishop, 8 De G. M. & G. 815, 26 L. J. Ch. 389, 3 Jur. (N. S.) 499, 5 W. R. 437; Williams v. Bosanquet, 3 Moore, 500, 1 Br. & B. 238, 21 R. R. 585; Stone v. Evans, Peake, Ad. C. 94; Haig v. Homan, 4 Bligh (N. S.) 380;

Sparks v. Smith, 2 Vern. 275; Pilkington v. Shaller, 2 Vern. 374.

<sup>39</sup> Traherne v. Saddleir, 5 Bro. P. C. 179; Eaton v. Jacques, 2 Dougl. 455.

<sup>40</sup> Traherne v. Saddleir, 5 Bro. P. C. 179.

<sup>41</sup> Lucas v. Comerford, 1 Ves. J.

it, was subsequently reversed by the chancellor and it is now doubtless the rule that an equitable mortgagee by deposit of the lease, has no liability for rent to the lessor, unless he has entered into possession.<sup>42</sup>

**§ 657. The recording assignments of leases.** Whether or not an assignment of a lease must be recorded always depends upon express statutory provisions. As between the parties to the assignment a failure to record by the assignee has no effect upon its validity. As between the original lessor and the assignee of the lease who has gone into possession, a failure to record will not defeat the assignee's right to possession or enable him to escape the payment of rent while he remains in possession. As between the assignee of the lease whose assignment is not recorded and a subsequent assignee whose assignment is recorded, if the prior assignee is in possession when the subsequent assignee takes the assignment, the latter will gain nothing by his record as against the assignee in possession, as the possession of the prior assignee is notice to all persons dealing with the property. Any person taking an assignment of a lease is bound to ascertain who is in possession of the premises and having ascertained that they are in possession of another person than the lessee with whom he is dealing, he must at his peril inquire as to the true possession and rights of the person in possession.<sup>43</sup> Where by statute an assignment of a lease is to be recorded, and an assignment of a lease in proper form is endorsed upon the lease itself and the instrument thus endorsed is delivered to the recording officer for record as an assignment of the lease, the assignment is properly recorded though the officer instead of copying the whole instrument in the record as it had been delivered to him merely recorded the assignment and referred to the lease itself by a memorandum as having been already recorded. The lease having been already recorded, there is no legal necessity for re-writing the entire instrument in the books of record. A me-

235, 3 Bro. C. C. 165; restated, 8 Sim. 499, 8 L. J. Ch. 131.

<sup>42</sup> Moores v. Choat, 8 Sim. 508, 8 L. J. Ch. 128, 3 Jur. 220; Moore v. Grey, 2 Ph. 717, 18 L. J. Ch. 15, 12 Jur. 952, affirming 2 De G. & Sm. 304.

<sup>43</sup> William v. Downing, 18 Pa. St. 60; Thomas, Lessor, v. Blackmore, 5 Yerg. (Tenn.), 113; Tibbals v. Ifland, 10 Wash. 451, 39 Pac. Rep. 102. In Maryland an assignment must be recorded. Mayhew v. Hardesty, 8 Md. 479.

memorandum of the application to record referring by book and page to the lease previously recorded together with the certificate that the paper was recorded as of the date of the application, is in full conformity with the statute and certainly within the power of the clerk to make.<sup>44</sup>

**§ 658. The recording of mortgages of leaseholds.** Whether a mortgage of a leasehold may, or must be recorded under a statute requiring or permitting the recording of deeds, or mortgages will depend almost wholly upon the express language of the statute. The statutes have been frequently construed and, while the courts are not wholly in harmony as to their meaning, it may be safely said that the difficulty lies not so much in determining the meaning of the language of the statute, as determining whether a mortgage of a leasehold is a chattel mortgage or whether it is a mortgage of real estate. A leasehold mortgage properly executed in the shape of a deed or conveyance, may be recorded under a statute permitting deeds to be recorded if the statutory requirements as to acknowledgment are complied with.<sup>45</sup> In some states by express statute mortgages of leaseholds are required to be recorded as chattel mortgages.<sup>46</sup> In Pennsylvania such mort-

<sup>44</sup> *Putnam v. Stewart*, 97 N. Y. 411, 417. "The memorandum, containing the time and place of the record original lease, is the precise equivalent of a re-recording of it, and there can be no more doubt of the authenticity of the instrument than as though it had been re-written on the day and at the place of the recording of the assignment itself."

<sup>45</sup> *Berry v. Mutual Ins. Co.*, 2 Johns. Ch. (N. Y.) 603; *Johnson v. Stagg*, 2 Johns. (N. Y.) 510, 523; *Breese v. Bank*, 2 E. D. Smith (N. Y.), 474.

<sup>46</sup> *Jennings v. Sparkman*, 39 Mo. App. 663; *Berry v. Mutual Ins. Co.*, 2 Johns. Ch. (N. Y.) 603; *Paine v. Mason*, 7 Ohio St. 198. In Pennsylvania such mortgages depend wholly upon statute for their

validity and unless the statutory requirements are complied with they are not valid. The omission to refer in the mortgage to the record of the lease, or, if the lease be not recorded, the omission to record it, is fatal to the validity of the mortgage. *Hilton's Appeal*, 116 Pa. St. 351, 9 Atl. Rep. 342. A mortgage recorded without the lease is void as to subsequent execution creditors and purchasers of the lease for value. *Sturtevant's Appeal*, 34 Pa. St. 149, 150. Annexing a copy of the lease to the mortgage and recording the two papers at the same time is a proper compliance with the statute where the lease is already recorded. *Ladly v. Creighton*, 70 Pa. St. 490, 493.

gages depend wholly upon statute for their validity and unless the statutory requirements are complied with they are not valid. The omission to refer in the mortgage to the record of the lease, or, if the lease be not recorded, the omission to record it, is fatal to the validity of the mortgage. A mortgage recorded without the lease is void as to subsequent execution creditors and purchasers of the lease for value. Where by reason of the law of the jurisdiction or because of the circumstances of the case, the property which is conveyed by a mortgage of a leasehold is regarded as a chattel real and not as personal property, the instrument ought to be executed, acknowledged and recorded as a real estate mortgage and not as a chattel mortgage. All the rules and principles of law and equity which apply to real estate mortgages, whether prescribed and enacted by statute or not, are then applicable to its construction and operation. But the general rule that courts will so construe an instrument as to give effect to the intention of the parties will be invoked in construing a mortgage of a lease and such an instrument need not be in any particular or prescribed form of words, for if the intention of the parties is apparent, it will be valid. The fact that the parties in executing a mortgage on a term which was also to include certain personal property which had become a part of the demised premises by being permanently attached to it by the lessee, used a printed blank intended for use as a chattel mortgage and that the property conveyed in it is described as goods and chattels, and even that the instrument is acknowledged as a chattel mortgage does not alter its character as a mortgage of real property. If the subject matter of a so-called chattel mortgage is the term and some personal property which is so attached to the realty by the lessee as to become a part of it, or if the lease to the mortgagor does not authorize its removal, and such removal will result in injury to the realty or to the fixtures, the mortgage of the lease and of the fixtures will be a mortgage of real estate and not a mortgage of a personal chattel.<sup>47</sup> The interest of a lessee in a term and the buildings which he has erected upon the demised premises under the stipulation of the lease that he may remove them at any time before the term expires, and which is terminable

<sup>47</sup> Cross v. Weare Commission, 46 Am. St. Rep. 902, affirming 45 153 Ill. 499, 38 N. E. Rep. 1038, Ill. App. 255.

on a specified notice by the lessor, is a chattel real when the lessee holds over with the lessor's consent after the term expires. A mortgage or deed of trust on such term and buildings is properly executed as a conveyance of real estate and the recording of such an instrument is notice to subsequent creditors and purchasers.<sup>48</sup> Mortgages upon leasehold estates are not comprised within the operation of a statute providing that mortgages of goods and chattels which are not accompanied by an actual and continued change of possession shall be void as against creditors unless the mortgage or a copy thereof is filed. Leaseholds are chattels real and not merely chattels so that an assignment or a mortgage of a lease is not subject to the same statutory rules as apply to personal chattels. The operation of the statute is confined to chattels which may be moved from place to place and which are capable of manual delivery and possession. The filing of a mortgage of a lease would therefore be useless and the omission of a mortgagee or assignee of a lease to reduce the premises to his possession, raises no presumption of fraud where it is not recorded as would be the case if it were goods or other personal chattel.<sup>49</sup>

<sup>48</sup> Knapp v. Jones, 143 Ill. 375, 379, 28 N. E. Rep. 820, 32 N. E. Rep. 832, affirming 38 Ill. App. 489, citing Bouvier's Law Dic. title Chattels Real, 2 Blackstone's Com. 387, 2 Kent. Com. 342, 1 Washburn on Real Property, Chap. 1, § 17; Griffin v. Marine Co., 52 Ill. 130; Conklin v. Foster, 57 Ill. 105; Dob-schuetz v. Holliday, 82 Ill. 373; Willoughby v. Lawrence, 116 Ill. 11; Kankakee Coal Co. v. Crane Bros. Mfg. Co., 28 Ill. App. 371.

<sup>49</sup> Booth v. Kehoe, 71 N. Y. 341, 344. The recording of mortgages of leaseholds, which are chattels real, is regulated and governed wholly by the statutes respecting the recording of conveyances of real estate. State Trust Co. v. Casino Co., 46 N. Y. Supp. 292, 19 App. Div. 344, affirming 41 N. Y. Supp. 1. In one instance it has been held that a mortgage of a

leasehold by the lessee is not a mortgage requiring to be recorded within the meaning of a statute providing for the registration of all mortgages and defeasible deeds in the nature of mortgages, on lands, tenements and hereditaments. Bramhall v. Hutchinson (N. J. 1886), 7 Atl. Rep. 873, 875, reversing Deane v. Hutchinson, 40 N. J. Eq. 83, 2 Atl. Rep. 292. Such a statute by its express language applies only to mortgages and defeasible deeds of lands, tenements and hereditaments and these terms include only freehold estates and not terms though for a thousand years. Nor will the fact that a lease is under seal make it a deed within the meaning of the statute permitting deeds or conveyances of land, tenements and hereditaments to be recorded. Usually it is not of much impor-

**§ 659. The assignment of subsequently accruing rents as distinct from the assignment of the reversion.** Unless specially reserved or otherwise assigned, the right to collect rents passes by an assignment of the reversion. The rents are incident to the reversion though not inseparable from it. By a general grant of the reversion the right to collect rent will pass as an incident, though by a grant of the rents due or to become due, the reversion will not pass.<sup>50</sup> The rents, though an incident of the reversion, are not absolutely inseparable from it, hence the reversion may be granted and the rents may, at the same time and by the same instrument be reserved, or the right to collect rent may be granted and the reversion may be reserved

tance whether a lease is or is not recorded except so far as it may be advisable to give a *bona fide* purchaser of the reversion notice of the exact terms of the lessee's occupancy, for usually the lessee is in actual occupation and his possession and occupation are notice to a subsequent grantee, mortgagee or lessee of the premises. If the lease itself be not recorded, and, particularly if it be assumed that actual possession and occupation are a sufficient substitute for record, there can be no justice in requiring a mortgage of a lease to be recorded as if the lease itself be not recorded there is nothing upon the record to establish the lessee's source of title. But, see, generally, Decker v. Clarke, 26 N. J. Eq. 163; Spielman v. Kliest, 36 N. J. Eq. 199. In Ohio Section 4112a, R. S., requires that "all leases" of land for the development of natural gas or oil "shall be recorded in the lease record in the office of the recorder of the proper county," and "no such lease shall have any force or validity until the same is filed for record as aforesaid except as between the parties thereto" unless the per-

son claiming thereunder is in actual and open possession of the land." Under this statute an unrecorded lease is without any validity, either at law or in equity as against a subsequent lessee or licensee, or other third person acquiring an interest in or lien on the land, although he took with notice of such prior unrecorded lease or license unless the person claiming thereunder was at the time in actual possession of the land. Northwestern Ohio Nat. Gas Co. v. City of Tiffin, 59 Ohio St. 420, 54 N. E. Rep. 878; Langmede v. Weaver, 60 N. E. Rep. 992, 65 Ohio St. 17.

<sup>50</sup> Indianapolis National Gas Co. v. Pierce, 25 Ind. App. 116, 56 N. E. Rep. 137; Abercrombie v. Redpath, 1 Iowa, 111; Townsend v. Isenberger, 45 Iowa, 670; West Shore Mills Co. v. Edwards, 24 Oreg. 475, 478, 33 Pac. Rep. 987; Grundin v. Carter, 99 Mass. 15; Page v. Culver, 55 Mo. App. 606; Allen v. Hall, 66 Neb. 84, 92 N. W. Rep. 171; reversing 64 Neb. 256, 89 N. W. Rep. 803; Van Wicklen v. Paulson, 14 Barb. (N. Y.) 654.

or both may be granted and conveyed to different persons by the lessor according to the intention of the parties.<sup>51</sup> So a rent charge may be apportioned or divided by grant or devise and the several grantees or devisees may bring separate distresses or actions to recover the rent.<sup>52</sup> The landlord has the absolute power to assign and transfer his right to collect the rents which have accrued or which may accrue under his lease. He may assign and convey the rights to the rents, either by an assignment of the lease, in which event all his right and title under it pass to his assignee, or he may assign the right to collect rent by an express assignment, when all that passes is the right to the rents as they accrue.<sup>53</sup> An assignment of the rents by the landlord, and his assignment of the lease are not identical. The assignment of rents is not necessarily either in law or in equity, an assignment of the lease which secures the rents.<sup>54</sup> An assignment of accrued rents is an assignment of a chose in action, and the assignee may sue at once and in his own name, if by statute the common law incapacity of an assignee to bring an action in his own name, has been removed. The

- <sup>51</sup> Alabama Gold L. Ins. Co. v. Oliver, 78 Ala. 158, 160; Peck v. Northrop, 17 Conn. 217, 220; Crosby v. Loop, 13 Ill. 625, 627; Wine-man v. Hughson, 44 Ill. App. 22; Watson v. Hunkins, 13 Iowa, 547; Childers v. Smith, 10 B. Mon. (Ky.) 235; J. Crossman's Sons v. Sanders, 114 La. 958, 38 So. Rep. 692; Welch v. Horton, 73 Iowa, 250, 34 N. W. Rep. 840; Stone v. Knight, 3 Met. (Mass.) 76; Beal v. Boston Car Spring Co., 125 Mass. 157, 160, 28 Am. Rep. 216; Perrin v. Repper, 34 Mich. 292; Brownson v. Roy, 10 Det. Leg. N. 302, 95 N. W. Rep. 710; Bloodworth v. Stevens, 51 Miss. 475; Tucker v. Whitehead, 58 Miss. 762; Culverhouse v. Worts, 32 Mo. App. 419; Haeussler v. Holman Paper Box Co., 49 Mo. App. 631; Page v. Culver, 55 Mo. App. 606; Cole v. Patterson, 25 Wend. (N. Y.) 426; Demerest v. Willard, 8 Cow. (N. Y.) 206; Stevens v. Lessa, 50 App. Div. 547, 64 N. Y. Supp. 28; Thomson v. Ludlum, 74 N. Y. Supp. 875; Gates v. Max, 125 N. Car. 139, 143, 34 S. E. Rep. 266; West Shore Mills Co. v. Edwards, 24 Oreg. 475, 478, 33 Pac. Rep. 987; Maxwell v. Urban, 22 Tex. Civ. App. 565, 55 S. W. Rep. 1124; Griffith v. Burlingame, 18 Wash. 429, 51 Pac. Rep. 1059; Robins v. Cox, I Lev. 22; Allen v. Bryan, 5 Bar. & Cres. 512.
- <sup>52</sup> De Coursey v. Guarantee T. & S. D. Co., 81 Pa. St. 217, 228; Riris v. Watson, 5 Mee. & Wel. 266, Co. Lit. 241; Gilbert on Rents, 172. An assignee of the rent may recover the rent from an assignee of the lessee's interest. Watson v. Hunkins, 13 Iowa, 547, 550.
- <sup>53</sup> Thomson v. Ludlum, 74 N. Y. Supp. 875.
- <sup>54</sup> White v. Kane, 53 Mo. App. 300.

assignee of rents which are to accrue in the future, must wait to sue until the rents are due and payable, according to the terms of the lease. No formal attornment by the tenant is required on an assignment of the lease or of the rents by the lessor. The lessee is bound to pay his accrued or accruing rent to the assignee as soon as he receives notice of the assignment.<sup>55</sup> Under the general rule of estoppel, he cannot dispute the title of the assignee except under the circumstances which would permit him to deny the title of the landlord. An assignment of the lease or of the rents by the lessor which does not in express terms purport to convey and transfer rents which have accrued at the date of its execution, will pass only rents which subsequently accrue.<sup>56</sup> The assignee is entitled to rents which thereafter become due, though the tenant has not attorned to him.<sup>57</sup> In those states where an assignee of a chose in action may by statute sue in his own name, it has been held that an assignment of rent though for a portion of the term, creates such a privity of estate between the assignee and the lessee, as will enable the assignee to sue in his own name.<sup>58</sup> If the landlord gives an order to a third person on a tenant to be paid out of rent which is to become due, which the tenant accepts, and subsequently the landlord conveys his reversion to a grantee with knowledge of the order, the latter will take subject to the rights of the payee under the order.<sup>59</sup> A lease for a year with an option in the lessee to "extend the lease for a further term of one or two years on the same terms and conditions, is a lease for one, two or three years at the option of the lessee. Hence it follows that rent which has accrued after the lessee has exercised his option accrues under the original lease and an assignment by the lessor of rents which are to accrue 'under the lease' carries the rent to the assignee."<sup>60</sup> And as between the assignee of the rents and a grantee of the premises who takes with knowledge of the prior assignment of the

<sup>55</sup> Kelly v. Bowerman, 113 Mich. 446.

<sup>56</sup> Pendill v. Fells, 67 Mich. 657, 35 N. W. Rep. 754; Wise v. Pfaaf, 98 Md. 576, 56 Atl. Rep. 815.

<sup>57</sup> Morris v. Niles, 12 Abb. Pr. (N. Y.) 103.

<sup>58</sup> Childs v. Clark, 3 Barb. Ch. (N. Y.) 52; Huerstel v. Lorillard,

6 Rob. (N. Y.) 260, 7 Rob. (N. Y.) 251; Moffatt v. Smith, 4 N. Y. 126.

<sup>59</sup> Leonard v. Burgess, 16 Wis. 41; Imler v. Baenish, 74 Wis. 567.

<sup>60</sup> Swan v. Inderlied, 187 N. Y. 372, 80 N. E. Rep. 195, reversing 101 App Div. 612, 92 N. Y. Supp. 1147.

rents, the assignee of the rent has the better right.<sup>61</sup> Where rent reserved for a term of years is severed from the reversion and assigned, it goes to the executor or administrator of the assignee and not to the heir of the owner of the reversion. Hence if the owner of an estate in fee leases it for years and on his death devises the rent for the term to a stranger and the latter dies, the rent thus devised goes to the personal representative of the devisee and not to his heir.<sup>62</sup>

**§ 660. The rights and remedies of an assignee of the rent against the tenant.** If by a lease the lessee has agreed to pay all annual taxes and charges for water that may become a lien, the assignment of the rents carries with the right to collect from the lessee all unpaid taxes and water rents which have become a lien as the taxes and water rates, being reserved as rent, pass by an assignment of the rent.<sup>63</sup> An assignment of the lease by the lessor who is also the owner in fee simple which also expressly includes the right to collect all rents unpaid and in arrears, conveys no reversionary interest to the assignee which will enable him to maintain an action to recover the possession. He can sue and recover rent from the lessee whether in or out of possession, but the right to the possession of the premises on a breach of a covenant to pay rent remains in the owner of the reversion.<sup>64</sup> Nor has the assignee of the rents any right to fixtures erected by the lessee on the premises during the term.<sup>65</sup> Nor any right of action on any covenant

<sup>61</sup> A lease for one year and the lessee "to have the premises for one year, one month and 20 days longer" creates a term for two years, one month and twenty days. *Chretien v. Doney*, 1 N. Y. 419.

<sup>62</sup> *Knolle's Case*, Dyer, 5 b.

<sup>63</sup> *Woolsey v. Abbott*, 65 N. J. Law, 253, 48 Atl. Rep. 949. An agreement by the landlord that a tenant shall collect the rents of the land in his own interest entered into upon the landlord finding himself unable at the term's end to pay in cash the tenant the value of a building erected by the tenant upon the land is in ef-

fect an assignment of the rents as security for the value of the tenant's fixtures and creates an equitable lien upon the premises in favor of the tenant, which is a security for the performance of the landlord's covenants. *Allen v. Gates*, 74 Vt. 376, 50 Atl. Rep. 1092.

<sup>64</sup> *Markin v. Whitaker*, 26 Ind. App. 211, 58 N. E. Rep. 542; *Bordereaux v. Walker*, 85 Ill. App. 86.

<sup>65</sup> *Thorn v. Sutherland*, 123 N. Y. 236, 238, 25 N. E. Rep. 362, reversing 51 Hun, 639, 4 N. Y. Supp. 694.

which runs with the land.<sup>66</sup> The right of a lessor to recover for a breach of a covenant to return in good condition remains in the lessor.<sup>67</sup> On the other hand, the reservation of a right to collect and sue for rent by the grantor of the reversion, does not enable him to maintain ejectment, or similar possessory action created by statute. The right to collect rent is a mere chose in action and not a corporeal hereditament of which the grantor can be put in possession or which entitles him to any right of entry upon the premises.<sup>68</sup> If, however, the grantor of the reversion reserves a building with the land situated upon the premises granted, with a right to rent the same and to collect the rent thereof, this is in effect a reservation of the use and occupation of the land for the term specified and the grantor has the right to the possession of the land as such and may maintain ejectment or forcible entry and detainer or any similar action.<sup>69</sup> At one time it was the rule that an assignee of the rents, who was not also the owner of the reversion, could not bring an action against the lessee in his own name, but must use that of the lessor. Under the modern practice the assignee of the rents may sue the lessee in his own name for rents accruing after the assignment as well as for those which may have accrued if the latter are included in the assignment.<sup>70</sup> The assignee may bring attachment for the rent

<sup>66</sup> *Allen v. Wooley*, 1 Blackf. (Ind.) 148.

<sup>67</sup> *Bordereaux v. Walker*, 85 Ill. App. 86.

<sup>68</sup> *Fiske v. Brayman*, 21 R. I. 195, 42 Atl. Rep. 878.

<sup>69</sup> *Allen v. Scott*, 21 Pick. (Mass.) 29. It is a general rule of construction that a reservation in a deed must be construed so as to give a practical right and not so as to render it worthless and unavailing. *Noble v. Railroad Co.*, 111 Ill. 447, and what will pass by words in a grant will be excepted by words in an exception contained in a deed granting an interest in real property. *Dand v. Kingscote*, 6 Mee. & Wel. 197.

<sup>70</sup> *Beal v. Boston Car Spring Co.*,

125 Mass. 157, 159, 28 Am. Rep. 216; *Kendall v. Carland*, 5 Cush. (Mass.) 74; *Hunt v. Thompson*, 2 Allen (Mass.) 341; *West Shore Mills Co. v. Edwards*, 24 Oreg. 475, 478, 33 Pac. Rep. 987; *Hunt v. Thompson*, 2 Allen (Mass.) 341; *Welch v. Horton*, 73 Iowa, 250, 34 N. W. Rep. 840. At common law the lessor's right to the rents due on the lease being a chose in action was not assignable though in equity the rule was otherwise. *Chapman v. McGrew*, 20 Ill. 201, 203; *Busby v. Jones*, 1 Scam. (Ill.) 34; *Hopkins v. Organ*, 15 Ind. 188; *Hicks v. Doty*, 4 Bush (Ky.) 420. Under statutes making instruments for payment of money or property assignable an agreement

under the statute. The assignment of the lease carries the lien of the lessor for rent together with all his remedies for its enforcement.<sup>71</sup> The tenant by whom rent is payable should be promptly notified of the fact that the landlord has assigned his right to collect the rent, for otherwise he will be released from liability to the assignee of the rents by his payment of the same to the assignor before notice. Constructive notice arising from recording the assignment as a real estate mortgage is not sufficient unless it is so provided by statute. Thus recording a mortgage of the premises made by the lessor, either before or after the execution of the lease, which contained an assignment of the rents to the mortgagee, is not notice to the lessee of the assignment where the mortgage is recorded merely as a real estate mortgage. But the recording and indexing of such a mortgage as a chattel mortgage so far as it relates to the rents, might operate as notice to the lessee.<sup>72</sup> A landlord who accepts a surrender of a lease in consideration of his lessee assigning to him his rights against undertenants, may sue the undertenants on this assignment. The surrender does not necessarily merge the rights of the lessee against his tenants for he might, in making the surrender, have expressly reserved his right to the rent from them or he might have assigned it to a stranger. If he expressly assigns it to the lessor, the latter succeeds to all his rights against undertenants, notwithstanding his own term is at an end by the surrender.<sup>73</sup> A purchaser of land who takes it subject to a lease by which

to pay rent and to do something else, as to repair or to render services, is not assignable. *Hicks v. Doty*, 4 Bush (Ky.) 420; *Macum v. Hereford*, 8 Dana (Ky.) 1. Under such circumstances the assignee is a necessary party plaintiff or defendant. *Hicks v. Doty*, 4 Bush (Ky.) 420, following *Gill v. Johnson*, 1 Met. (Ky.) 449. So a written guarantee upon a lease by which the signers "guarantee the rent and performance of the covenants by the lessee in the within lease" is not assignable as it includes other obligations be-

sides that of paying money. And as the writing constitutes an indivisible whole no assignment of it is good as to any part thereof to convey the legal title. *Potter v. Gronbeck*, 117 Ill. 404; 408.

<sup>71</sup> *Haywood v. O'Brien*, 52 Iowa, 537, 538, 3 N. W. Rep. 545.

<sup>72</sup> *Trulack v. Donahue*, 76 Iowa, 758, 759, 40 N. W. Rep. 696.

<sup>73</sup> *Beal v. Boston Car Spring Co.*, 125 Mass. 157, 160, 28 Am. Rep. 216.

the vendor conveys an easement in the land to a third person, cannot by entering into an arrangement with the lessee which will put an end to the lease and create a new lease by which he will benefit, defeat the right of an assignee of the rent due under the old lease. Here the land and the lease were sold separately and to different persons. The conduct of the purchaser of the land will be frowned on in equity which will hold him under his new contract as a trustee for the assignee of the rents.<sup>74</sup>

**§ 661. The form of an assignment of rents.** Under the modern practice no particular formality is required to effect an assignment of rent. Any transaction between the parties showing an intention to pass a beneficial interest is sufficient. The assignment may be either in writing or by parol.<sup>75</sup> A written order by a landlord on his tenant to pay accruing rent to a third person is an assignment of the rent. The tenant is bound to pay to the person whether he accepts the order or not after he is notified by the payee named in it. This he must do though the landlord subsequently directed him not to pay. Frequently orders of this sort are vague and doubtful in their language. They will be liberally construed so as to ascertain their real meaning in view of the fact that these papers are ordinarily framed by laymen without professional assistance. The payee under such an order has an equity to collect future rents in which he will be protected not only against the landlord who has made the order, but also against subsequent encumbrancers claiming under the landlord who take with actual or constructive notice of his rights.<sup>76</sup> A lessor can assign his interest in the lease by an endorsement thereon.<sup>77</sup> At the present time, under modern statutes, an assignee under such circum-

<sup>74</sup> *Wood v. Londonderry*, 10 Beav. 465, 16 L. J. Ch. 46, 12 Jur. 735.

<sup>75</sup> *Chapman v. Plummer*, 36 Wis. 262, 264; citing *Hooker v. Eagle Bank of Rochester*, 30 N. Y. 83. See, also, *Wells v. Cody*, 112 Ala.

278, 20 So. Rep. 381, and *Lowery v. Peterson*, 75 Ala. 109. A stat-

ute providing that a claim for rent may be assigned refers to an oral as well as to a written assignment and either is valid. *Wells v. Cody*, 111 Ala. 278, 20 So. Rep. 381.

<sup>76</sup> *Abrams v. Sheehan*, 40 Md. 446, 458.

<sup>77</sup> *Dixon v. Buell*, 21 Ill. App. 203, 204.

stances, may enforce every covenant in the lease by an action in his own name. Prior to the enactment of such statutes the assignee would have had to sue at law in the name of the assignor, though in any proceeding in equity he would have been regarded as the real party in interest and permitted to carry on his suit in his own name.<sup>78</sup>

**§ 662. Priorities between the assignee of the rent and the assignee of the reversion.** The title of an assignee of future rents to whom they were assigned separately from the reversion is paramount to that of a subsequent purchaser<sup>78a</sup> or devisee<sup>79</sup> with knowledge or notice of the reversion from the reversioner where the assignee of the rents has notified the tenants to pay rent to him only or has properly recorded the assignment under the statute.<sup>80</sup> Where a note for rent is assigned prior to the conveyance of the reversion, the assignee of the note and not the grantee of the reversion is entitled to the rent, and may enforce any lien created by the statute.<sup>81</sup> But the conveyance of the reversion before the assignment of the rent note, carries with it the rent when it becomes due as against the assignee of the note for the rent.

**§ 663. The duty of the assignee for creditors to lease the real property over which he has control.** A voluntary assignment for the benefit of creditors does not, in the absence of a stipulation to that effect, in the deed of assignment, impose upon the assignee any duty to the creditors to lease the real estate of the assignor. Hence where the assignee, after the assignment permits the assignor to remain in possession of premises owned by him, and to use the same as before the assignment, the assignee is not liable to account to the creditors

<sup>78</sup> The royalties in a mining lease are rent and may be assigned and the assignee of such rent, though not owning the fee may sue for the same in his own name. *Williams v. Hayward*, 1 El. & El. 1040, 28 L. J. Q. B. 374, 5 Jur. (N. S.) 1417, 7 W. R. 563.

<sup>78a</sup> *Brownson v. Roy*, 10 Detroit Leg. N. 302, 95 N. W. Rep. 710, 713; *Leonard v. Burgess*, 16 Wis. 4, 40, 42.

<sup>79</sup> *Stevens v. Sessa*, 50 App. Div. 547, 64 N. Y. Supp. 28.

<sup>80</sup> An assignment of the lease by the lessor passes the legal title to the rents and this title cannot be retransferred to the lessor by a mere oral agreement or by a manual delivery of the lease. *Border-eaux v. Walker*, 85 Ill. App. 86.

<sup>81</sup> *Alabama, etc., Co. v. Oliver*, 78 Ala. 158, distinguishing *Westmoreland v. Foster*, 60 Ala. 448.

for the rent of the premises which he might have received had he leased them.<sup>82</sup> If by reason of the special circumstances of any particular case, any duty is imposed upon the assignee to lease the premises of the assignor, he has a reasonable time to do so. If he shall within a reasonable time proceed to sell the land of his assignor and if, within a few months after he has accepted the trust, he shall effect a sale of the land, he will not be responsible for the rents of the premises for the period intervening his acceptance and of the trust and the sale.<sup>83</sup>

**§ 664. The liability of the estate of a bankrupt lessee for the rent.** Rent which has accrued prior to the date upon which a lessee is declared a bankrupt is a debt which is provable against his estate. But rent accruing on a lease after the lessee has been declared a bankrupt is not provable as a debt of the estate.<sup>84</sup> A landlord is not entitled to rent from the date that summary proceedings pending when the lessee was put into bankruptcy are enjoined down to the date of the adjudication of bankruptcy. He is entitled only to a proper allowance by the court for the use of the premises from the date of the service of the injunction terminating or staying the summary proceedings down to the date on which the lessee was adjudicated an involuntary bankrupt. The same rule applies to the use of the premises after the adjudication.<sup>85</sup> Where a lessee prior to his bankruptcy surrenders the premises to another as lessee but continues to pay the rent, and subsequently, but still prior to his bankruptcy, directs the lessor to relet them, and agrees to account and be responsible for the rent until the premises are relet, the debt created under this agreement may be proved against the estate of the bankrupt.<sup>86</sup> The loss of rent occurring after the bankruptcy of the lessee, on the reletting of the premises by the lessor who has terminated the tenancy because of the breach of a covenant, cannot be proved as a debt against

<sup>82</sup> Detwiler's Appeal, 96 Pa. St. 323.

<sup>83</sup> Creager v. Creager, 10 Ky. Law Rep. 424, 9 S. W. Rep. 380.

<sup>84</sup> In re May, 16 Fed. Cases, 9,325, 7 Ben. 238; In re Hufnagel, 12 Fed. Cases, 6,837; In re Com-

mercial Bulletin Co., 6 Fed. Cases, 3,060, 2 Woods C. C. 220; In re May, 47 How. Prac. 87.

<sup>85</sup> In re Lynch, 15 Fed. Cases, 8,634, 7 Ben. 26.

<sup>86</sup> In re Bruce, 4 Fed. Cases, 2,044, 6 Ben. 515.

the estate of the bankrupt.<sup>87</sup> The same rule is applicable to an assignment by a lessee for the benefit of creditors.<sup>88</sup> This rule has not been altered by the American or English bankruptcy statutes which merely allow an apportionment of the rent due to the day of the adjudication of bankruptcy.<sup>89</sup> A tenant's discharge in bankruptcy does not affect the right of the landlord to collect rent from him, accruing after the adjudication and while he still continues the possession.<sup>90</sup>

**§ 665. The acceptance of a lease by a trustee in bankruptcy.** It is very well settled that the bankruptcy of the lessee, voluntary or involuntary, in the absence of an express stipulation to that effect contained in the lease, does not *ipso facto* terminate the lease.<sup>91</sup> The trustee in bankruptcy appointed by the court has power either to abandon or to accept a lease held by the bankrupt.<sup>92</sup> The title of the tenant in the lease passes at once to the trustee subject to his election whether he shall accept it.<sup>93</sup> If the trustee has any doubts as to the desirability of accepting the lease, he should apply for instructions to the court which has appointed him.<sup>94</sup> If either expressly or by implication arising from his conduct, he shall accept the lease, he stands in the posi-

<sup>87</sup> *Ex parte Houghton*, 12 Fed. Cases, 6,725, 1 Low. 554; *In re Croney*, 6 Fed. Cases, 3,411, 8 Ben. 64; *In re Hufnagel*, 12 Fed. Cases, 6,837.

<sup>88</sup> *In re Bristol* (Minn.) 33 N. W. Rep. 852. The assignment is only for the benefit of creditors who are such at the date it is made. The claim for rent does not accrue until the lessee has enjoyed the use of the premises and until it has accrued it is a mere contingency giving the lessor no right of action against any person. The very existence of the lessor's claim for rent depends upon the contingency that the lessee shall use and occupy the premises until the day upon which the rent is payable unless the rent is payable in advance. For that reason a claim for rent before the day on which it is to be paid is not an

"uncertain and contingent demand" within a statute allowing uncertain and contingent demands to be proved against a bankrupt's estate. *Deane v. Caldwell*, 127 Mass. 242, 244; *Riggin v. Maguire*, 15 Wall. (U. S.) 549; *French v. Marse*, 2 Gray (Mass.) 111, 115; *Savory v. Stocking*, 4 Cush. (Mass.) 607.

<sup>89</sup> *Ex parte Houghton*, 1 Lowell, 554; *Deane v. Caldwell*, 127 Mass. 242, 244.

<sup>90</sup> *Prentiss v. Kingsley*, 70 Pa. St. 120.

<sup>91</sup> *In re Adams*, 124 Fed. Rep. 142, 143; *Woodworth v. Harding*, 77 N. Y. Supp. 969.

<sup>92</sup> *Summerville v. Kelliher*, 144 Cal. 155, 77 Pac. Rep. 889.

<sup>93</sup> *Olden v. Sassman*, 67 N. J. Eq. 239, 57 Atl. Rep. 1075.

<sup>94</sup> *In re Adams*, 124 Fed. Rep. 142, 143.

tion of an assignee of the lessee and is bound by the covenants and conditions of the lease.<sup>95</sup> In any case after adjudication the matter is wholly in the hands of the trustee for the landlord cannot thereafter treat the lease either as void or voidable without his consent.<sup>96</sup> Where an assignee in bankruptcy of the lessee, while disclaiming any interest in a lease, arranges with the lessor to have a distress withdrawn and in consideration thereof he promises to pay all rent which is then in arrears and all rent which might subsequently become due during his occupancy of the premises, and he subsequently vacates the premises, the lessor can recover against the estate of the bankrupt damages for a breach of the covenant to pay subsequently accruing rent. The fact that the lessor, on the surrender by the assignee, entered the demised premises and relet them at a lower rent is neither an eviction nor an acceptance of the surrender which would release the assignee in bankruptcy.<sup>97</sup> Where a trustee in bankruptcy of a lessee of a farm occupies the buildings on the farm until he disposes of the growing crops of the lessee, he becomes liable to the landlord for the use and occupation of the farm and buildings.<sup>98</sup> His acceptance of the lease whenever made, relates back from the date of the acceptance and takes effect from the time the bankruptcy proceedings were commenced.<sup>99</sup> The landlord of a bankrupt tenant who at the request of the assignee in bankruptcy permits the assignee to remain in possession of premises in order that the latter may sell the goods of the bankrupt which are on the premises by reason of which much better prices could be realized, is entitled to receive a reasonable compensation for use and occupation. The assignee must pay more than mere storage rates for keeping the goods on the premises. The opportunity of selling the property of the bankrupt without the expense of a removal and the allowance by the landlord of a sufficient time to do this,

<sup>95</sup> *Summerville v. Kelliher*, 144 Cal. 155, 77 Pac. Rep. 889 (holding the trustee bound by a stipulation in the lease to deliver to the lessor a proportion of the crops raised by the lessee as rent). *White v. Griffing*, 44 Conn. 437.

<sup>96</sup> *In re Adams*, 124 Fed. Rep. 142, 143.

<sup>97</sup> *In re Orne*, 12 Fed. Rep. 779.

<sup>98</sup> *In re Luckenbill*, 127 Fed. Rep. 984. And where the bankrupt is cultivating the farm on shares the trustee who continues to cultivate the farm may pay the rent in a share of the crops.

<sup>99</sup> *White v. Griffing*, 44 Conn. 437.

are valuable to the estate and the landlord ought to be compensated for them.<sup>1</sup>

**§ 666. The duties of a receiver as a tenant.** A receiver derives his authority from the court appointing him not from or by reason of any act of the parties to the action. The purpose of his appointment is to provide some one in whose custody the property may be placed *pendente lite* and who may preserve and protect it until the court shall determine in whom the title shall vest.<sup>2</sup> In the meantime the law does not cast the title upon the receiver or require that he shall take possession only so far as it is necessary for him to do so in order to protect the property. Nor does the receiver merely because of his appointment become liable upon any agreements or covenants which were binding upon the prior owners of the property at the time of his appointment as receiver. He is entitled to a reasonable time after taking possession of the property to determine whether he shall adopt or rescind any lease or other contract which involves the property over which he has assumed control. If a leasehold is a part of the property taken by a receiver he has a reasonable time to ascertain the value of the leasehold and if he shall find that the best interest of the parties demand a discontinuance of the lease he may return the leased premises to the landlord in good order and condition, tendering the rent for the same for such period as he has used it.<sup>3</sup> The receiver of the estate of a deceased per-

<sup>1</sup> *In re Secar*, 18 Fed. Rep. 319, 320, citing *In re Breck*, 12 N. B. R. 215; *In re Hart Mfg. Co.*, 17 N. B. R. 459, and allowing the landlord one-half the rent under the tenant's lease.

<sup>2</sup> *Chicago Union Bank v. Kansas City Bank*, 136 U. S. 223, 236, 10 Sup. Ct. 1013.

<sup>3</sup> *Oil Company v. Wilson*, 142 U. S. 313, 322, 12 Sup. Ct. 235; *Hoyt v. Stoddard*, 2 Allen (Mass.) 442; *Quincy, M. & P. Ry. Co. v. Humphreys*, 145 U. S. 82, 12 Sup. Ct. 787, 793, 36 L. ed. 632; *United States Trust Co. v. New York W. S. & B. R. Co.*, 101 N. Y. 483, 5 N.

E. Rep. 316; *Decker v. Gardner*, 124 N. Y. 334, 26 N. E. Rep. 814; *Stokes v. Hoffman House of New York*, 60 N. E. Rep. 667, 167 N. Y. 554, 53 L. R. A. 870, affirming 61 N. Y. Supp. 821, 46 App. Div. 120. "It is well settled that a receiver, or an assignee in bankruptcy, or an assignee for the benefit of creditors, if he elects to accept a lease belonging to the debtor or assignor, becomes by such election assignee of the lease and personally liable on the covenant to pay rent, of which liability he can only discharge himself by an assignment or surrender." By Andrews,

son who is invested with all the real and personal property of the estate, and who enters into the possession of real property under a lease which was executed to the deceased, becomes liable as receiver, but not personally, for the rent of such property, and he must pay the rent out of any funds which may be in his hands whether derived from the real or personal property.<sup>4</sup> A claim for rent against a receiver which has accrued prior to the appointment of a receiver, is subordinate to the claims of the holders of receiver's certificates issued by the direction of the court to enable the receiver to carry on or to wind up the estate over which he has charge. But a claim for rent incurred by the receiver after his appointment and before he is empowered to issue receiver's certificates, is not postponed in order of payment to the lien of such certificates. So a claim for rent for the occupancy of premises by receivers of the property of a lessee, does not lose its priority over the receiver's certificates subsequently issued by the authority of the court to pay for completing a building on the premises by reason of the fact that the lease is not recorded. The recording acts are designed only to give notice of prior rights in land to a person acquiring a subsequent interest in the land, and the holders of the receiver's certificates have no interest in the land.<sup>5</sup>

**§ 667. The powers and duties of a receiver as a landlord.** When it happens that a receiver is appointed over the property of one who is the lessor of real estate, the question arises to what extent the receiver is bound by the contracts made by

J., in *In re Otis*, 101 N. Y. 580, 5 N. E. Rep. 571. An order appointing a receiver to carry on a hotel business and conferring authority upon him "to do any and all other things which may be necessary or proper in the ordinary conduct of similar places of business" does not authorize him to pay rent during the receivership; and, where pending foreclosure, he remains in possession and carries on the business he does not thereby incur an absolute legal liability but the lessor has an equitable claim only

subject to superior equities if any to have the profits of the business applied to the payment of the rent. 61 N. Y. S. 821, 46 App. Div. 120; *Stokes v. Hoffman House of New York*, 60 N. E. Rep. 667, 167 N. Y. 554, 53 L. R. A. 870.

<sup>4</sup> *Wells v. Higgins*, 132 N. Y. 459, 30 N. E. Rep. 861, 44 N. Y. St. Rep. 608, affirming 24 N. Y. State Rep. 378, 5 N. Y. Supp. 895.

<sup>5</sup> *Perrin & Smith Printing Co. v. Cook, etc., Co.* (Mo. App. 1906), 93 S. W. Rep. 337

the lessor prior to his appointment. In determining this, we must keep in view, first the rule that the receiver derives all his authority from the court appointing him and not from the party into whose shoes he steps; and, second, that the main purpose of the appointment of the receiver is to protect the interests of the owner of the property whoever he may be, during the time it is in litigation and until it is determined who is entitled to it. A receiver in charge of real property must collect the rents of the same, and it is the duty of the lessee, on being informed that a receiver has been appointed, to pay rent subsequently accruing to him.<sup>6</sup> The usual and proper course is for the receiver of property which is under lease to serve a notice of his appointment on all the tenants, and if after this, they pay their rent to the original lessor, they do it at their own peril.<sup>7</sup> A receiver with the general authority to lease from year to year, may serve a notice.<sup>8</sup> The receiver may maintain the same actions as might the lessor for the recovery of the premises upon non-payment of rent. Ordinarily, a receiver may distrain for rent in arrears without a special order of the court, permitting him to do so.<sup>9</sup> Though it has been also intimated that where the rent was in arrear for more than one year, that it was necessary that the receiver should apply to the court for permission to distrain or to take other proceedings against the tenant in arrear.<sup>10</sup> Where the court directs the tenants of real property which is in the hands of a receiver to pay him their rent, and they refuse or neglect to do so, they may be punished for contempt, if the receiver elects to do so, though doubtless a more satisfactory procedure would be for the receiver to oust them by summary proceedings.<sup>11</sup> The receiver acting as a landlord, may perform such acts as are imperatively and urgently necessary for the protection and preservation of the property without an order of the court. Thus he may repair the real property where the lessor whom he represents had covenanted in the lease to keep

<sup>6</sup> Hobson v. Sherwood, 19 Beav. 575.

<sup>9</sup> Pitt v. Snowden, 3 Atk. 750.

<sup>7</sup> Holler v. Hedges, 2 Ir. Ch. (N. S.) 370; McLaughlin v. Longan, 4 Ir. Eq. 325; McDonnel v. White, 11 H. L. Cases, 271.

<sup>10</sup> Brandon v. Brandon, 5 Madd.

473.

<sup>8</sup> Wilkinson v. Colley, 5 Burr.

<sup>11</sup> Thomas v. Thomas, F. & K. 621; Brown v. O'Connor, 2 Hog. 77; Mason v. Mason, F. & K. 429.

the property in repair. Under such circumstances, it will be presumed that the court would have granted him permission to make these repairs had he applied to it. Though, where an expensive scheme of improvement or renovation is contemplated by the receiver, it would be proper, and it may be indispensable, for him to procure the prior permission of the court to his action. The receiver having charge of property may lease it for such a term as might be created by the present owner of the property.<sup>12</sup> It is always necessary however, for the receiver to procure the order of the court permitting him to make a lease. Upon application by a receiver for permission to make a lease of real property which is in his charge, he must show facts which will satisfy the court that a lease upon the terms and conditions suggested by him and set forth in his application, will be to the best interests of all the parties concerned. A lease thus made will bind all parties and a court has no power to annul or revoke a lease properly made by a receiver under its order, except under the same conditions that empower individuals to annul or revoke a contract.

**§ 668. The rights of a receiver in foreclosure to the rent.** In an action to foreclose a mortgage where the land is shown to be an insufficient security, and particularly if the mortgagor is insolvent, a receiver of the rents and profits of the premises will be appointed by the court pending the action.<sup>13</sup> The receiver, when appointed under such circumstances, stands in the place of the landlord to all tenants who have been made parties to the action and to all persons who become tenants during the action and until judgment. He is entitled to collect such rents as have accrued since the action was begun which are still unpaid and those which subsequently became due. He has no right to any rent which has been paid by the tenant to the owner of the equity prior to his appointment.<sup>14</sup> A tenant who has been served with process in the action or who leases land after the filing of a *lis pendens* thereon, takes the term subject to the action in which it is filed. He in effect, becomes

<sup>12</sup> Bayly v. Gaines, 2 S. E. Rep. 739, 12 Va. Law J. 78.

<sup>14</sup> Wyckoff v. Schofield, 98 N. Y. 475; Riker v. Bagley, 84 N. Y. 461.

<sup>13</sup> Brick v. Hornbeck, 43 N. Y. Supp. 301, 19 Misc. Rep. 218.

a party to the action thereby. He is bound by all subsequent proceedings in it, and may be ousted under the judgment therein, giving possession to another person than his landlord. He must also surrender possession or attorn to a receiver and pay him the reasonable value of the use of the premises from the date of his appointment as receiver, though he may have paid his rent in advance to the landlord before the receiver was appointed.<sup>15</sup> A tenant whose lease was made prior to the mortgage and who was not a party to the action, need not attorn to the receiver, nor will his refusal to do so be a contempt of court.<sup>16</sup> But the refusal of a person in possession of property to pay rent to the receiver or to surrender the premises, is not a contempt of court where the receiver was not directed by the court appointing him to collect the rents or to take possession of the property.<sup>17</sup> A tenant whose lease is subsequent to a mortgage must pay a receiver who is appointed in the foreclosure, the full amount of the rents as they accrue. He cannot as against the receiver offset an account which he has against the landlord.<sup>18</sup> So one who just before the default in a mortgage takes a lease of the premises for one year and pays the mortgagor five months' rent in advance, cannot as against a receiver who was appointed in an action in which he was a party, collect rents from the subtenants which accrue after the receiver was appointed.<sup>19</sup> A receiver appointed during the pendency of a foreclosure is entitled to the rents that accrue during the action as against a receiver appointed in supplementary proceedings against the mortgagor, though the rents accrue after the appointment of the latter receiver, before the appointment of the receiver in the foreclosure.<sup>20</sup> It has been held, however, that as between the receiver in foreclosure, and the owner of the equity at least where there is no clause in the mortgage pledging the rents and profits as security, that the owner is entitled to rents down to the time of sale unless it can positively be shown with reasonable certainty that

<sup>15</sup> *Gaynor v. Blowett*, 82 Wis. 313, 52 N. W. Rep. 313.

<sup>18</sup> *Derby v. Brandt*, 90 N. Y. Supp. 980.

<sup>16</sup> *American Mortgage Co. v. Sire*, 92 N. Y. Supp. 182; *In re Kennelly*, 92 N. Y. Supp. 182.

<sup>19</sup> *Fletcher v. McKeon*, 75 N. Y. Supp. 817.

<sup>17</sup> *Wardlaw v. Herrington* (Ga. 1906), 54 S. E. Rep. 699.

<sup>20</sup> *Donlan Mfg. Co. v. Cannella*, 89 Hun, 21, 69 N. Y. St. Rep. 8.

the property is an insufficient or an inadequate security for the rent.<sup>21</sup> One who leases property from a receiver for a term of years for a specified annual rent subject to the approval of the court in the absence of an express agreement to that effect, is not entitled to a lease exempting him from liability for injury by fire, though occurring by his negligence or that of his servant, and also providing that in case the premises were destroyed by fire, they should be re-built by the lessor without delay, the rent in case of accidental fire only to be suspended in the meantime, though the lessee covenants to repair, to keep the building insured, and to be liable for any injury by fire caused by their own negligence.<sup>22</sup> The estoppel which is created or which exists between a receiver appointed to receive rents in an action relating to real property and tenants in possession, exists only so long as the receiver holds office. It cannot be taken advantage of by third persons who are strangers to the receiver's title, though it enures to the new receiver or to a successor of the tenant entering upon or renting the premises while the receivership exists. An attornment of a tenant to a receiver appointed by a court to collect rent and the payment of rent to him create a tenancy by estoppel between the tenant and the receiver, but do not enure to enable a person who is found ultimately to have the legal title to treat the tenant as his tenant and to distrain for rent.<sup>23</sup>

<sup>21</sup> Ross v. Vernam, 6 App. Div. 246, 39 N. Y. Supp. 1031. <sup>23</sup> Evans v. Mathias, 7 El. & Bl. 590, 26 L. J. Q. B. 309, 3 Jur. (N.

<sup>22</sup> Bodman v. Murphy, 35 Md. 154, 159. S.) 793.

## CHAPTER XXVII.

### THE EVICTION OF THE TENANT.

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- 701. The right of the landlord to a bill of particulars.
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§ 669. **The scope of this chapter.** In this chapter will be considered the doctrine of eviction as applicable to the relation of landlord and tenant. In the first place we have to define

eviction and distinguish it from a mere trespass. We will next treat of the various circumstances which in any given case constitute an eviction. For it is unquestioned that under the modern cases certain conduct on the part of the landlord towards his tenant during the term will be regarded as an eviction which in earlier times would have had no such effect. Further on in the chapter we will take up the question of eviction by a paramount title and the question of the tenant's remedy including the measure of damages in cases of eviction. In the last section the doctrine of eviction is distinguished from the failure of the landlord to give his tenant possession at the date of the beginning of the lease.

**§ 670. Eviction defined and classified.** Formerly the word eviction was employed to mean the actual expulsion of a tenant from the premises either by the assertion of a paramount title or by process of law.<sup>1</sup> The word at the present time is commonly employed to denote an expulsion from the premises or any act by the landlord or his servants or by agents by which the tenant is permanently deprived of the use of the premises.<sup>2</sup>

<sup>1</sup> Hayner v. Smith, 63 Ill. 430, 14 Am. Rep. 424; Royce v. Guggenheim, 106 Mass. 201, 8 Am. Rep. 322; Edmison v. Lowry, 3 S. Dak. 77, 44 Am. St. Rep. 774; Sutton v. Foulke, 2 Pa. Co. Ct. Rep. 529; Upton v. Townend, 17 Com. Bench. 30, 84 Eng. Com. L. 30, 25 L. J. C. P. 44, 1 Jur (N. S.) 1089. "Originally an eviction was understood to be a dispossession of the tenant by some act of his landlord, or by the failure of his title—it has come in later years to include any wrongful act of the landlord, which may result in an interference with the tenant's possession in whole or in part. The act may be one of omission as well as of commission." Oakford v. Nixon, 177 Pa. St. 76, 39 W. N. C. 49.

<sup>2</sup> Isabella Gold Mining Co. v. Glenn, 37 Colo., 165, 86 Pac. Rep.

349; Delmar Inv. Co. v. Blumenfeld, 118 Mo. App. 308, 94 S. W. Rep. 823; Hyman v. Jockey Club Wine Co. 9 Colo. App. 299; Fleming v. King, 100 Ga. 440; Walker v. Tucker, 70 Ill. 527; Barrett v. Boddie, 158 Ill. 479; Patterson v. Graham, 140 Ill. 531, affirming 40 Ill. App. 390; Reasoner v. Edmundson, 5 Ind. 393; Miller v. Maguire, 18 R. I. 770. "To evict a tenant, according to the original meaning of the word, is to deprive him of the possession of the land." Keating v. Springer, 146 Ill. 481, 37 Am. St. Rep. 175. To constitute an eviction there must be dispossession by a paramount title or by the act of the landlord or he or his servants must make the occupancy of the tenant so annoying and uncomfortable as to justify the tenant in removing from the demised premises. Blauvelt

Evictions may be classified according to their character as actual evictions and constructive evictions; according to their extent as total and partial evictions, and according to their cause as evictions by the landlord or his agents and those which arise from the assertions of a paramount title in a stranger. An actual eviction is the actual physical expulsion of the tenant from all or from a part of the premises. A constructive eviction is any conduct on the part of the landlord short of an actual eviction which effectually deprives the tenant of the use and benefit of all or of any part of the premises.<sup>3</sup> The terms partial eviction and total eviction indicate their meaning so clearly that no definition is necessary. An eviction by a title paramount is an ouster by one who has secured possession by the assertion of a title in him paramount to the title of the landlord.<sup>4</sup>

v. Powell, 59 Hun. (N. Y.) 179; Waller v. Edmonds Cockfield, 111 La. 595, 35 So. Rep. 778. An eviction of a tenant is an interference with his possession of the premises, or some part thereof, by or with the consent of the landlord, by which the tenant is deprived of their use without his consent. Ogden v. Sanderson, 3 E. D. Smith (N. Y.) 166. The ouster of the tenant from lawful possession is not alone sufficient to make the landlord responsible. It must further appear that the tenant dissented, and that the ouster occurred through the landlord, or by his consent. Perry v. Wall, 68 Ga. 70. "An eviction of a tenant consists in the disturbance of his possession, his expulsion or amotion, depriving him of the enjoyment of the premises demised, or any part thereof, by title paramount, or by the entry and act of the landlord. The eviction may operate as a bar, partially or wholly, to the right to demand rent falling due in the future." Warren v. Wagner, 75 Ala. 188, 202.

<sup>3</sup> Patterson v. Graham, 140 Ill. 531, affirming 40 Ill. App. 399. "If a tenant is deprived, by the wrongful act of the landlord, of the beneficial use of the premises, and is compelled thereby to quit and abandon them, it amounts to what has been called a constructive eviction." Bradley v. De Goicouria, 12 Daly (N. Y.) 393; 67 How. Prac. (N. Y.) 76.

<sup>4</sup> In Upton v. Townend, 17 C. B. 30 on p. 47 the Court said "It is extremely difficult at the present day to define with technical accuracy what is an eviction. Lately, the word has been used to denote that which formerly it was not intended to express. In the language of pleading, the party evicted was said to be expelled, amoved and put out. The word eviction,—from *evincere*, to evict, to dispossess by a judicial course,—was formerly used to denote an expulsion by the assertion of a title paramount, and by process of law. But that sort of eviction is not necessary to constitute a suspension of rent, because it is now well settled, that, if the

**§ 671. Trespass and eviction distinguished.** An eviction is clearly to be distinguished from a trespass. Something more than a mere trespass is necessary on the part of the landlord to constitute an eviction. Nor is it material to what extent the trespass, or the successive acts of trespass, may obstruct the tenant in the possession and enjoyment of the premises. For such a trespass the tenant may recover damages but cannot plead it as an eviction which is a wrong of a more serious and permanent character. An act of the landlord constituting at the most merely a trespass by him upon the premises and not intended by him to bring about or to result in the permanent removal or expulsion of the tenant, or to deprive him of the permanent occupation of the premises does not amount to an eviction.<sup>5</sup> Thus, to illustrate, the entry of the landlord upon

tenant loses the benefit of the enjoyment of any portion of the demised premises, by the act of the landlord the rent is thereby suspended. The term eviction is now popularly applied to every class of expulsion or amotion. Getting rid of this old notion of eviction, I think it may now be taken to mean this,—not a mere trespass and nothing more, but something of a grave and permanent character done by the landlord with the intention of depriving the tenant of the enjoyment of the premises.” This is a leading case in the doctrine of constructive eviction.

\* Warren v. Wagner, 75 Ala. 188, 202; Rice v. Dudley, 65 Ala. 68, 71; Hyman v. Jockey Club Wine Co., 9 Colo. App. 299; Holly v. Brown, 14 Conn. 255; Way v. Myers, 64 Ga. 760, 761; Fleming v. King, 100 Ga. 449; Baumgardner v. Consolidated Copying Co., 44 Ill. App. 74; Dennick v. Ekdahl, 102 Ill. App. 199; Hayner v. Smith, 63 Ill. 430, 14 Am. Rep. 124; Barrett v. Brodie, 158 Ill. 479, 42 N.

E. Rep. 143, 145, 49 Am. St. Rep. 172, affirming 57 Ill. App. 226; Lynch v. Baldwin, 69 Ill. 210; Morris v. Tillson, 81 Ill. 607; Royce v. Tuggenheim, 106 Mass 201, 8 Am. Rep. 322; Fuller v. Ruby, 10 Gray (Mass.) 285; Skally v. Shute, 132 Mass. 367; Bartlett v. Farrington, 120 Mass. 284; International Trust Co. v. Schumann, 158 Mass. 287, 33 N. E. Rep. 509; Day v. Watson, 8 Mich. 535; Adams v. Werner, 120 Mich. 452, 79 N. W. Rep. 636; Mc Fadin v. Rippey, 8 Mo. 738, 740; Dimmock v. Daly, 9 Mo. App. 354; Meeker v. Spalsbury, 66 N. J. Law, 60, 48 Atl. Rep. 60; Huber v. Ryan, 26 Misc. Rep. 428, 56 N. Y. Supp. 135; See 57 App. Div. 34, 67 N. Y. Supp. 973; Seigel v. Neary, 77 N. Y. Supp. 854, 38 Misc. Rep. 297; Manchester, Sheffield and Lincolnshire Railway v. Anderson, 67 L. J. Ch. 568, (1892) 2 Ch. 394, 78 L. T. 821. Explaining Sander son v. Berwick-upon-Tweed Corporation, 53 L. J. Q. B. 559, 13 Q. B. 547; Vatel v. Herner, 1 Hilt. (N. Y.) 149; Lounsbury v. Snyder,

the premises and his temporary use of a portion of the same during the absence of the tenant,<sup>6</sup> or his entry after the premises have been in part destroyed by fire for the purpose of clearing up the ruins,<sup>7</sup> or the landlord's entry on the land where the tenant is mining coal and his taking coal therefrom<sup>8</sup> or his entry on the premises and taking fruit from trees growing there<sup>9</sup> or piling firewood thereon<sup>10</sup> or removing the tenant's property unlawfully stored and sold upon the premises<sup>11</sup> is at the most a trespass and not an eviction. Repeated entries by the landlord upon the premises, his carrying away crops, cutting down fruit trees, and carrying away a cook stove, do not amount to an eviction but are merely distinct acts of trespass for which the tenant has an action of damages but cannot refuse to pay rent.<sup>12</sup> On the other hand it has been held that the entry of the landlord upon meadow land which was a part of the demised premises and cutting and carrying away the hay growing thereon was an eviction that discharged the tenant from the payment of rent accruing in the future.<sup>13</sup> The fact that a lessee, who has rented

<sup>6</sup> 31 N. Y. 514; *Peck v. Hiller*, 31 Barb. (N. Y.) 117; *Barnum v. Fitzpatrick*, 27 Abb. N. C. 334; *Randel v. Albertis*, 1 Hilt (N. Y.) 285; *McKenzie v. Hatton*, 141 N. Y. 6, 35 N. E. Rep. 929, 56 N. Y. St. Rep. 489, affirming 70 Hun, 142, 24 N. Y. Supp. 88, 53 N. Y. St. Rep. 776; *Murphy v. Marshall*, 179 Pa. St. 516, 36 Atl. Rep. 294; *Bernett v. Bittle*, 4 Rawle (Pa.) 339; *Wilson v. Smith*, 5 Yerg. (Tenn.) 379, 399; *Silber v. Larkin*, 94 Wis. 9, 68 Mo. Rep. 406; *Hunt v. Cope*, Cowp. 242.

<sup>7</sup> *Way v. Meyers*, 64 Ga. 760, 761.

<sup>8</sup> *Fleming v. King*, 100 Ga. 449.

<sup>9</sup> *Tiley v. Moyers*, 43 Pa. St. 404.

<sup>10</sup> *Harris v. Watson*, 1 Leg. Int. (Pa.)

<sup>11</sup> *Lounsbury v. Snyder*, 31 N. Y. 514.

<sup>12</sup> *Newby v. Sharpe*, 8 Ch. Div. 39.

<sup>13</sup> *Bartlett v. Farrington*, 120 Mass. 284.

<sup>13</sup> "It is quite well settled that it is not every entry of the landlord, although wrongful, that constitutes a breach of covenant. A landlord may be a trespasser without breaking the covenant . . . It is necessary that something more than an entry and injury be shown, for these are elements of a trespass. It must also be shown that the entry was an assertion of right or title; in other words was in the nature of a total or partial eviction." *Avery v. Dougherty*, 102 Ind. 447, 2 N. E. Rep. 125. See, also, *Talbott v. English*, 156 Ind. 299, 59 N. E. Rep. 857. The building of an extension of a house by the owner who is also the landlord of the demised premises, by reason of which a window in a kitchen and an opening in the wall of a water closet, were shut off and the light prevented from coming through

the demised premises for the purpose of carrying on the liquor business therein is unable to secure a license on account of the subsequent building of a school within a certain distance of the premises does not constitute an eviction.<sup>14</sup> In conclusion it may be said that some acts on the part of the landlord may be either a trespass or an eviction according to his intention as it is expressed or implied. If the action of the landlord induces or tends to induce one to believe that the landlord means to bring about the complete expulsion of the tenant from the premises there is an eviction.<sup>15</sup> But if no intention to oust the tenant can reasonably be implied from his conduct it is a trespass merely.<sup>16</sup> The rule is that the entry of the landlord upon the premises does not discharge the tenant from the payment of rent unless the tenant was actually expelled or evicted or unless he was deprived of the beneficial use of the premises in whole or in part. The distinction between a trespass and an eviction is to be found by determining the question whether the act of the landlord is of such a character as to deprive the tenant of the beneficial use of the premises for any considerable time or is merely temporary.<sup>17</sup> Finally in order that there shall be an

them into the demised premises is not an eviction. *Solomon v. Fantozzi*, 43 Misc. Rep. 61, 86 N. Y. Sup. 754.

<sup>14</sup> *Miller v. Maguire*, 18 R. I. 770, 30 Atl. Rep. 966.

<sup>15</sup> *Lynch v. Baldwin*, 69 Ill. 210, 213.

<sup>16</sup> As there are some acts of interference by the landlord with the tenant's enjoyment of the premises which do not amount to an eviction but which may be either acts of trespass or eviction, according to the intention with which they are done it follows that, whether the acts complained of amount to an eviction, depends upon circumstances and in all cases is a question of fact. Thus it is a question of fact whether the landlord in putting in a water

pipe and a pump and sink in an upper story without the consent of the tenant had constructively evicted him and the solution of this question depends upon the intention of the landlord with which the act was done which depends upon all the circumstances. *Lynch v. Baldwin*, 69 Ill. 210.

<sup>17</sup> *Wilson v. Smith*, 5 Yerg. (Tenn.) 379. "The term eviction is now popularly applied to every class of expulsion or amotion. That it might be taken to mean this, not a mere trespass and nothing more; but something of a general and permanent character done by the landlord with an intention of depriving the tenant of his enjoyment of premises must be done." *Hayner v. Smith*, 63 Ill. 430; *Lynch v. Baldwin*, 69 Ill. 210, 213.

eviction there must be actual possession in the tenant which will be fully considered in the next section.

**§ 672. The necessity of a legal possession in the tenant.** A lessee cannot sue for a breach of an implied or express covenant for quiet enjoyment until he is entitled to have possession. For there can be no breach of this covenant while the lessee is not entitled to possession. Hence, where one agrees with a lessee to take an underlease to begin in the future and before the time arrives the lessee has disqualified himself from giving possession by a forfeiture of his own lease, the lessee of the underlease cannot maintain an action on the express covenant of the lessor for quiet possession until the date arrives when he was to go in possession.<sup>18</sup> For it is unquestioned that in order that there shall be an eviction there must be a possession of the premises by the tenant before the act of the landlord or other person which is claimed to be an eviction.<sup>19</sup> The tenant cannot in contemplation of law be evicted from what he has never possessed. So where a landlord delivers possession of a portion of the premises when the lease is executed but subsequently fails to place the tenant in possession of the balance by reason of which the tenant is compelled to vacate and does abandon that portion of which he has possession, it is no eviction, though the tenant has a cause of action to recover damages for the landlord's failure to give him possession.<sup>20</sup> The failure of the landlord to remove his own chattels from the demised premises is not an eviction as to that portion of the premises which is occupied by the chattels. The remedy of the tenant is to remove the chattels at the lowest reasonable expense and charge the expense to the landlord.<sup>21</sup> It is al-

<sup>18</sup> Ireland v. Bircham, 2 Bing. N. C. 90, 2 Scott 207, 4 L. J. Col. 305. Rep. (N. Y.) 722 and compare *contra* Lawrence v. French, 25 Wend. 443, 7 Hill (N. Y.) 519.

<sup>19</sup> Stiger v. Monroe, 109 Ga. 457, 34 S. E. Rep. 595; Birckhead v. Cummins, 33 N. J. Law 44; Etheridge v. Osborn, 12 Wend. (N. Y.) 461, 464; Vanderpool v. Smith, 4 Abb. Ct. of App. Dec. (N. Y.) 529, 532.

<sup>20</sup> McClurg v. Price, 59 Pa. St. 420, 423, 98 Am. Dec. 356; see also Doolittle v. Selkirk, 7 Misc.

Rep. (N. Y.) 722 and compare *contra* Baumgardner v. Consolidated Copying Company, 44 Ill. App. 74; but see *contra* Moore v. Mansfield, 182 Mass. 302, 65 N. E. Rep. 398, in which the court says that the distinction between an eviction and a refusal to put the tenant into possession of a part of the premises is material only when

ways a good defense to an eviction for the landlord to allege and prove that the tenant had voluntarily abandoned the possession or that his right to the possession had expired before the landlord's entry. So where it is claimed that a tenant has been evicted by an entry by the landlord and his taking possession, it is permissible for the landlord to show the tenant had abandoned the premises and leased others before the landlord entered<sup>22</sup> or that the tenant was wrongfully in possession as a tenant holding over after the expiration of his term.<sup>23</sup> In the latter case the tenant is a trespasser and the right of the landlord to oust him is unquestioned.

**§ 673. The intention of the landlord.** This is always material. The conduct of the landlord, which is alleged by the tenant to constitute a constructive eviction, must in interfering with the latter's use and enjoyment of the premises clearly indicate an intention on the part of the landlord that the tenant shall no longer continue in possession. The intention may be inferred from the acts. Whether the intention is present in any particular case depends therefore upon the particular facts of each. But the intention should not be inferred unless the acts themselves are of a serious and permanent character, the natural result of which is to deprive the tenant of possession.<sup>24</sup> These rules are based upon the well-known legal

the question of waiver is material and is claimed to have arisen from the tenant's occupancy of the balance of the premises. The distinction is sound as to those cases where the tenant entered and the landlord subsequently failed to perform a covenant for an improvement or one affecting the enjoyment of the premises. *Etheridge v. Osborn*, 12 Wend. (N. Y.) 529. "An eviction consists in taking from a tenant some part of the demised premises of which he was in possession not in refusing to put him in possession of something which, by the agreement of the parties he ought to have enjoyed. The omission of a land-

lord therefore, to perform such covenant does not amount to an eviction, and is no bar to the lessor's claim for rent. The lessee's remedy is by an action to recover damages for a breach of the covenant." By the court in *Vanderpool v. Smith*, 4 Abb. Court of App. Dec. (N. Y.) 461, 464; citing *Hanks v. Virtue*, 5 Adol. & Ell. 367.

<sup>22</sup> *Humiston, Keeling & Co. v. Wheeler*, 175 Ill. 514, 518, 51 N. E. Rep. 893, 70 Ill. App. 349.

<sup>23</sup> *Juergen v. Allegheny County*, 204 Pa. St. 501, 54 Atl. Rep. 281; *Randall v. Rosenthal* (Tex.), 31 S. W. Rep. 822.

<sup>24</sup> *Eisenhart v. Ordean*, 3 Colo.

maxim that every man is presumed to intend the natural and probable consequences of his own acts. Hence, therefore, conduct of the landlord, the natural and probable result which will be to render it necessary for the tenant to abandon the premises, or his failure to perform duties which he owes to the tenant, the non-performance of which renders the premises untenantable, by reason of which the tenant does abandon the premises, will be conclusively presumed to have been done with the intention to oust the tenant.<sup>25</sup> Where, however, the acts of the landlord constitute a trespass when viewed in their most unfavorable aspect, no intent to evict will be presumed. Thus, where a landlord enters on the premises to repair after damage caused by fire, his acts or the acts of his agent in removing the tenant's goods from one part of the building to another, is not an eviction. Their removal was merely for the purpose of facilitating the making of repairs and indicated no intention on the part of the landlord that the tenant must remove from the premises.<sup>26</sup> Again, the going on the premises by the land-

App. 162; *Hyman v. Jockey Club Wine etc. Co.*, 9 Colo. App. 299; *Barrett v. Boddie*, 158 Ill. 479, 42 N. E. Rep. 143, 57 Ill. App. 226; *Keating v. Springer*, 146 Ill. 481; 34 N. E. Rep. 805, 37 Am. St. Rep. 175; *First National Bank v. Adam* (Ill. 1890), 25 N. E. Rep. 576; *Leadbetter v. Roth*, 25 Ill. 587; *Hayner v. Smith*, 63 Ill. 430; *Lynch v. Baldwin*, 69 Ill. 210; *Morris v. Tillson*, 81 Ill. 607; *Walker v. Tucker*, 70 Ill. 528; *Dennick v. Eckdahl*, 102 Ill. App. 199; *Daniels v. Logan*, 47 Iowa, 395; *Grabenharst v. Nicodemus*, 42 Md. 236; *Bartlett v. Farrington*, 120 Mass. 284; *De Witt v. Pierson*, 112 Mass. 8; *Mirick v. Hoppin*, 118 Mass. 582; *Riley v. Lally*, 172 Mass. 244, 51 N. E. Rep. 1088; *Hayward v. Ramge*, 33 Neb. 836, 51 N. W. Rep. 229, 230; *McFadin v. Rippy*, 8 Mo. 738; *Vatel v. Herner*, 1 Hilt. (N. Y.) 149; *Lounsherry v. Snyder*, 31 N. Y. 514; *Peck v. Hiler*, 31 Barb.

(N. Y.) 117; *Edgerton v. Page*, 20 N. Y. 281; *Upton v. Greenlees*, 17 Com. B. 64, 84 E. C. Law, 64; *Holland v. Townsend*, 136 Pa. St. 392, 407, 20 Atl. Rep. 794, 26 W. N. C. 412; *Harburg v. May*, 153 Pa. St. 216, 217, 25 Atl. Rep. 750; *Miller v. Maguire*, 18 R. I. 770, 772; *Dudley v. Estell*, 6 Leigh (Va.) 562.

<sup>25</sup> *Skally v. Shute*, 132 Mass. 267; In *Waite v. O'Neil*, 76 Fed. Rep. 408; 47 U. S. App. 19 the court by Lurton, J., said "When the wrongful act of a lessor upon or in regard to the leased premises are such as to deprive the lessee of the beneficial enjoyment of them, and the lessee in consequence abandons the premises, it amounts in law to an eviction, without other evidence that the landlord intended to deprive the tenant of the possession."

<sup>26</sup> *Smith v. McLean*, 22 Ill. App. 451.

lord during the term, his taking flowers and the annual crops therefrom, cutting down decayed trees and removing some of the tenant's chattels do not show an intent to evict. It is very plain that such conduct should not have been prompted by an intention to oust the tenant or to deprive him of the use and benefit of the premises. If illegal and unjustifiable, they are at the most mere trespasses.<sup>27</sup> The action of the landlord in taking the furniture of the tenant by means of a writ of replevin, which he was empowered to do under the terms of a chattel mortgage which he held covering the furniture, is not an eviction. The service of such a writ indicates no intention to oust the tenant, nor will delay in serving it, not directed by the landlord, have that effect.<sup>28</sup> So also the service of process by the landlord to secure the possession of the premises will always be presumed to have been done with an intention to evict by the landlord. Intention need not be proved expressly but may always be inferred from the conduct of the landlord. There is no necessity, however, of proving malice or wantonness to constitute an eviction, though, if proved, they may be considered in aggravation of damages. Thus, the removal of the tenant's property from the premises, which is alleged to constitute an eviction, need not be proved to have been maliciously or wantonly done.<sup>29</sup>

**§ 674. Actual eviction.** An actual eviction as distinct from a constructive eviction occurs when the landlord, either personally or by his authorized agent, enters upon and takes physical possession of the whole or of some part of the premises, with the intention, presumed or implied, of ousting the tenant therefrom, and the tenant actually abandons the premises. All other evictions are constructive merely. In the following sections constructive evictions will be considered and illustrated.

**§ 675. An action by the landlord to recover possession.** An action of ejectment or some similar action brought by the landlord against the tenant to recover possession, resulting in a judgment of ouster against the tenant, is an eviction which

<sup>27</sup> Bartlett v. Farrington, 120 Mass. 284. Realty Co., 35 Wash. 535, 77 Pac. Rep. 839.

<sup>28</sup> Morris v. Tillson, 81 Ill. 607. Jennings v. Bond, 14 Ind. App.

<sup>29</sup> Rice Fisheries Co. v. Pacific 282, 42 N. E. Rep. 957.

terminates the rights and obligations of the parties under the lease. It has been held on the one hand that the mere institution of an action by the landlord to recover possession justifies the lessee in voluntarily abandoning the premises upon the theory that there is an intention on the part of the landlord to evict him.<sup>30</sup> But it has also been held that the mere beginning of an action of ejectment by a landlord against a tenant, is not an eviction unless the tenant actually abandons the premises. Hence, if pending the action, the tenant remains in the premises, or if not in possession himself, collects rent from his sub-tenants who are in possession, he cannot refuse to pay his own rent on the grounds that he has been evicted by the institution of an action of ejectment, as he had not been deprived of the beneficial use of the premises.<sup>31</sup>

**§ 676. Constructive eviction arising from interference with the tenant's beneficial use of the premises.** It has been elsewhere pointed out that any conduct on the part of the landlord, even though not amounting to an actual physical ousting of the tenant from the possession of the premises, but which effectually deprives the tenant of the use and benefit of all or of a portion of the premises, amounts to a constructive eviction.<sup>32</sup> What particular acts or omissions on the part of the landlord shall in law amount to a constructive eviction cannot be defined by a general rule which shall be applicable to all circumstances. Whether a constructive eviction exists always depends upon the facts in each particular case. By this is meant the situation of the parties to the lease, the character of the premises, the use to which the tenant intends to put them, and the acts which constitute the conduct of the landlord. Speaking generally, the acts of the landlord in relation to the premises must be such as will absolutely prevent the use of the premises by the tenant or by his sub-tenants for the particular purpose for which they were leased. The mere apprehension of an eviction will not entitle the tenant to withhold accrued

<sup>30</sup> *Agar v. Winslow*, 12 Cal. 587, 56 Pac. Rep. 422.

<sup>31</sup> *Cohen v. Dupont*, 13 N. Y. Super. (Sandf.) 260; *Peck v. Hiler*, 14 How, Pr. (N. Y.) 155; *Edgerton v. Page*, 5 Abb. Prac. (N. Y.), 20 N. Y. 281, 285; *Rogers v. Ostrom*, 35 Barb. (N. Y.) 523; following *Dyett v. Pendleton*, 8 Cow. (N. Y.) 728; *Poston v. Jones*, 2 Ired. Eq. (N. Car.) 350, 38 Am. Dec. 683.

rents.<sup>33</sup> There must be some intentional act on the part of the landlord, or by another person with his consent, which will reasonably tend to deprive the tenant of the use of the premises wholly or in part. If the tenant's occupation is made so inconvenient or unpleasant that he is, in fact, deprived of that full enjoyment of the premises to which the payment of his rent entitles him, and this condition of affairs is brought about directly or indirectly by the action of the landlord, it is an eviction. While the actual exclusion of the tenant is not necessary, yet it must appear that the interruption by the landlord of the tenant's enjoyment of possession has for its object a dispossess of the tenant. The interruption must be so direct, positive, permanent and substantial as to operate as an effectual exclusion of the tenant by the landlord from the beneficial enjoyment of some part of the leased premises. In other words, the act must be more than a mere trespass or a slight annoyance by the landlord or by some one acting for him and under his direction.<sup>34</sup>

<sup>33</sup> Pickett v. Ferguson, 45 Ark. 177, 199; Wade v. Halligan, 16 Ill. 507, 512.

<sup>34</sup> Talbott v. English, 156 Ind. 299, 59 N. E. Rep. 857. In the case of Edwards v. Candy, 14 Hun (N. Y.) 576 the tenant went into possession of a house to be used by him as a summer boarding house. When sued for the rent the tenant pleaded an eviction and in proof of his claim showed the following facts and conduct on the part of the landlord. He proved that his landlord disturbed the boarders by brutal conduct in the parlor, by ringing the bell on the Sabbath, by ordering the tenant's company off the premises; that the landlord, who boarded with the tenant, got into a passion and threw the carving knife off the table; that he thumped upon the floor before the

bell was rung in the morning and that he made indecent exposures of his person to the inmates of the house, going about the house with his pants down and unbuttoned and declaring that he would do what he liked. He also frequently slandered the tenant to his boarders and told persons who came to look at rooms that he did not want them to stop there, for the tenant was not fit to keep boarders. The landlord also told the tenant that he would do all he could to injure him. He also cut boughs from the trees on the farm, interfered with the employees of the tenant, abused the tenant's wife and threatened her with violence. He absolutely refused to make the repairs he was bound to make under the lease and did everything he could to make the life of the tenant miser-

§ 677. Illustrations of constructive evictions. Where a landlord occupied a portion of the premises over the tenant, and the landlord carried on a grocery business therein, and the dripping of liquids from the grocery store rendered the premises occupied by the tenant below unfit for use, it was a constructive eviction.<sup>35</sup> The action of the landlord in tearing down advertising signs which a tenant had the right, under his lease, to put on the premises to inform the public of the nature of the business, which was that of a ticket broker, is an eviction.<sup>36</sup> So, also, where a landlord, who retains possession of a part of the building immediately above the premises occupied by the tenant, negligently allows water from his premises to flow into the tenant's floor by which it is rendered untenantable, and the landlord refuses on notice to avert the nuisance, it is a breach of the implied covenant of quiet enjoyment, and practically amounts to an eviction.<sup>37</sup> The action of the landlord in erecting a building on land adjoining the demised premises, which building thus erected was much higher than the demised premises, as a result of which the chimneys of the house which was occupied by the tenant were caused to smoke to the great annoyance of the tenant, who was a physician, is an eviction.<sup>38</sup> So the erection of a building on the rear of the lot which deprives a portion of the demised premises of light and air,<sup>39</sup> the

able and his occupation of the premises inconvenient, and still the court held that there was no eviction. But the court based its decision upon the fact that the tenant had not abandoned the possession but on the other hand had, after the objectionable conduct by the landlord exercised an option to take a renewal of the lease.

<sup>35</sup> Jackson v. Eddy, 12 Mo. 209.

<sup>36</sup> O'Neill v. Manget, 44 Mo. App. 279.

<sup>37</sup> York v. Steward, 21 Mont. 515, 55 Pac. Rep. 29.

<sup>38</sup> In deciding this case the court proceeded upon the rule that any action on the part of the

landlord which interfered with the enjoyment of the premises by the tenant is an eviction, although the tenant is not actually dispossessed, and the court furthermore said that where the landlord demised premises for the carrying on of a particular business he must refrain from any acts which would render the premises unfit for the purpose for which they were leased. Tebb v. Cave, 69 L. J. Ch. 282, (1900) 1 Ch. 642, 82 L. T. 115, 48 W. R. 318.

<sup>39</sup> Royce v. Guggenheim, 106 Mass. 201, 8 Am. Rep. 322; *contra* Palmer v. Wetmore, 4 N. Y. Super Ct. Rep. 316

cutting of gas and water pipes, which supply the tenant, by the landlord,<sup>40</sup> the depositing of large quantities of lumber on the sidewalk in front of the premises by which, egress and ingress being prevented, the lessee is prevented from carrying on a business,<sup>41</sup> forbidding an under tenant to pay rent,<sup>42</sup> taking up and removing iron rails which are necessary to a full use of the premises,<sup>43</sup> putting locks on the doors of the premises and stationing a watchman upon the grounds to see that the doors are not opened<sup>44</sup> or unreasonably obstructing a show window used by the lessor, a retail dealer, for exhibiting his goods,<sup>45</sup> is a constructive eviction. Some of the cases go to great lengths in holding conduct by the landlord to constitute an eviction. So where the landlord who lived upon the premises and who was a person of a hasty temper and of a prying and officious disposition rendered the condition of the tenant unendurable by his unreasonable demands and repeated acts of discourtesy finally culminating in a violent, verbal and physical assault upon the tenant it was held to be a constructive eviction.<sup>46</sup> So generally it has been held that an intentional disturbance by the family of the landlord for which he is responsible to the beneficial use and enjoyment of the premises by the tenant by reason of which the business of the tenant is seriously injured and the convenience and comfort of himself and his family have been destroyed, is an eviction.<sup>47</sup>

<sup>40</sup> Insurance Co. v. Myers, 4 Lanc. Bar (Pa.) 151; Germania Fire Ins. Co. v. Myers, 8 N. Y. St. Rep. 349.

<sup>41</sup> Edmison v. Lowry, 3 S. D. 77, 52 N. W. Rep. 583, 17 L. R. A. 275, 44 Am. St. Rep. 774.

<sup>42</sup> Leadbeater v. Roth, 25 Ill. 587.

<sup>43</sup> Peck v. Hiler, 14 How. Prac. (N. Y.) 155.

<sup>44</sup> Pendill v. Eells, 67 Mich. 657, 35 N. W. Rep. 754, 757.

<sup>45</sup> Herpolsheimer v. Funke, 1 Neb. (Unof.) 471, 95 N. W. Rep. 688.

<sup>46</sup> Wyse v. Russell, 16 Misc. Rep. 53, 54, 73 N. Y. St. Rep. 264, 37

N. Y. Supp. 683; Cohn v. Dupont, 1 Sandf. (N. Y.) 263.

<sup>47</sup> Cohen v. Dupont, 3 N. Y. Super Ct. Rep. 260. In Peck v. Hiler, 14 How. Prac. (N. Y.) Rep. 155 on page 161 it is said by Strong, J. that a manual or physical expulsion of the tenant from the premises is not necessary to constitute an eviction. Any intentional and injurious interference by the landlord which deprives the tenant of the means or power of the beneficial enjoyment of the premises or of any part of the same is an eviction. See, also, to the same effect Lay v.

**§ 678. The lessor's failure to heat the premises properly.** If the lessor is under an obligation to heat the premises for his tenant his failure to do so, if it renders them uninhabitable, will constitute an eviction. Thus where the landlord of an

Bennett, 4 Colo. App. 252; Agar v. Winslow, 123 Cal. 587, 56 Pac. Rep. 422; Billany v. Smith, 4 Houst. (Del.) 113; Hayner v. Smith, 63 Ill. 430; Lynch v. Baldwin, 69 Ill. 210; Barrett v. Boddie, 158 Ill. 479, 42 N. E. Rep. 143; Talbot v. English, 156 Ind. 299, 59 N. E. Rep. 857, 860; Royce v. Guggenheim, 106 Mass. 201; Brown v. Water Co., 152 Mass. 463, 25 Atl. Rep. 966; Pridgeon v. Boat Club, 66 Mich. 326, 33 N. W. Rep. 502; Coulter v. Norton, 100 Mich. 389, 59 N. W. Rep. 863, 43 Am. St. Rep. 458; O'Neill v. Manget, 44 Mo. App. 279; (tearing down tenant's signs); Scott v. Simons, 54 N. H. 426; Tallman v. Murphy, 120 N. Y. 345; Dyett v. Pendleton, 8 Cow. (N. Y.) 727; Sully v. Schmidt, 147 N. Y. 248, 41 N. E. Rep. 514; Insurance Co. v. Sherman, 46 N. Y. 372; Cooper v. Kollstadt, 67 N. Y. Supp. 181; West Side Savings Bank v. Newton, 76 N. Y. Supp. 616, 57 How. Pr. (N. Y.) 152; Hoeveler v. Fleming, 91 Pa. St. 322; Edmison v. Lowry, 3 S. D. 77, 52 N. W. Rep. 583, 585, 17 L. R. A. 275, 44 Am. St. Rep. 774; Alger v. Kennedy, 49 Vt. 109, 119, 24 Am. Rep. 107; Wusthoff v. Schwartz, 32 Wash. 337, 73 Pac. Rep. 407; Silber v. Larkin, 94 Wis. 9, 68 N. W. Rep. 406; Upton v. Townend, 84 E. C. L. 30; Kitchen Bros. Hotel Co. v. Philbin, 2 Neb. (Unof.) 340, 96 N. W. Rep. 487; (Closing a door

and passageway which lead into the tenant's premises.) The landlord's breach of a covenant to put in a skylight and door is not an eviction. Huber v. Ryan, 26 Misc. Rep. 428, 56 N. Y. Supp. 135. As to the landlord's bad language and conduct amounting to an eviction. Ewing v. Cottman, 9 Pa. Super. Ct. Rep. 444, 43 W. N. C. 525. Evidence that a landlord was a hard tempered and dangerous man is admissible to show effect of his actions and threats on the conduct of the tenant in leaving the premises. Baumier v. Antean, 79 Mich. 509, 44 N. W. Rep. 939. "An eviction depends on the materiality of the deprivation. If trifling and producing no substantial discomfort or serious inconvenience, it will be disregarded, and will not afford cause for the termination of the relation of landlord and tenant. Leases would not be worth the paper on which they are written if the engagements of the parties could be set at naught upon such slight and trivial pretexts. To constitute a constructive eviction, there must be an intentional and injurious interference by the landlord which deprives a tenant of the beneficial enjoyment of the demised premises, or materially impairs such beneficial enjoyment." Seaboard Realty Co. v. Fuller, 67 N. Y. Supp. 146, 147, 33 Misc. Rep. 109, 8 Ann. Cases

apartment house who had covenanted to furnish the tenant of an apartment therein proper and sufficient heat, fails to do so but keeps the apartment at such a low temperature that it is unfit for occupancy, his conduct constitutes an eviction. The lessee can vacate the apartment upon any day of the term that it is insufficiently heated.<sup>48</sup> But the tenant must as a rule give the landlord notice of the insufficiency of the heat furnished by him and the landlord is then allowed a reasonable period after such notice to remedy the evil complained of. Until the proper amount of heat is supplied the tenant is under no obligation to heat the apartment himself or to go to the expense of purchasing oil stoves or other heating apparatus.<sup>49</sup> The tenant is not bound however to surrender the premises upon the occurrence of the first breach of the contract to furnish heat. It is his duty to call the attention of the landlord, or of his representative, to the chilly condition of the premises and to request that a sufficient amount of heat shall be supplied, for which purpose he must give the landlord a reasonable time. This being so the tenant has a right to wait a reasonable time for the landlord to furnish the heat which is required. His forbearance for a reasonable time to surrender possession because of the lessor's failure to supply heat does not necessarily constitute a waiver of his right to abandon the premises where the lessor fails to fulfill his covenant to heat them.<sup>50</sup> So a tenant who hires apartments relying upon a landlord's statement that a furnace in the house will properly heat the same, may sue for damages as for an eviction and he does not waive his right to do so, if he shall bring his action

418. An outbreak of scarlet fever in a hotel in which a tenant occupies apartments without negligence or lack of diligence on the part of the landlord to prevent the spread of the disease is not an eviction either actual or constructive. *Majestic Hotel Co. v. Eyre*, 53 App. Div. 273, 65 N. Y. Supp. 745.

<sup>48</sup> *Bass v. Rollins*, 63 Minn. 226, 65 N. W. Rep. 348; *Trenkman v. Schneider*, 56 N. Y. Supp. 770, 26 Misc. Rep. 695; *Butler v. New-*

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house, 85 N. Y. Supp. 373; *O'Gorman v. Harby*, 18 Misc. Rep. 228, 41 N. Y. Supp. 521, 75 N. Y. St. Rep. 811; *Filkins v. Steele*, 124 Iowa, 742, 100 N. W. Rep. 851; *Lawrence v. Burrell*, 17 Abb. N. C. (N. Y.) 313, 314.

<sup>49</sup> *O'Gorman v. Harby*, 18 Misc. Rep. 228, 41 N. Y. Supp. 521, 522, 75 N. Y. St. Rep. 811.

<sup>50</sup> *Minneapolis Co-operative Co. v. Williamson*, 51 Minn. 53, 52 N. W. Rep. 986.

within a reasonable period, by paying rent in the meantime.<sup>51</sup> The rule that the tenant must abandon the premises before he can plead an eviction must however be always kept in mind in all cases of this character. Hence if during the winter when heat is absolutely needed it is not supplied, and the tenant, while complaining of the omission of the landlord, fails to abandon the premises, he cannot subsequently, when heat is not needed, or needed only to a very slight extent, surrender the premises because they had been insufficiently heated prior thereto and claim an eviction.<sup>52</sup> The tenant may, by reason of his silence and acceptance of the benefits conferred by it, be estopped from proving that heating apparatus which the landlord had contracted to install in the building for his use was not of the character and capacity specified in the lease. A tenant, who being deceived by the landlord's statement of the character of the apparatus which he has installed, delays his complaint for an unreasonable time after the installation, cannot thereafter be heard to claim that the heat furnished or the steam power supplied is insufficient. What delay is unreasonable, is for the court. It has been held that the silence of the tenant coupled with his use of the apparatus for one year, would estop the tenant.<sup>53</sup> In the absence of an express agreement to that effect, a landlord is not bound to heat the demised premises. A covenant on the part of the landlord to heat the portion of the building occupied by a tenant, will not be implied from the fact that the tenant is obligated by his lease to pay to a tenant in another portion of the building, one-half of the latter's expenses in operating a boiler which furnishes heat, light, and power for the whole building, though the landlord expressly agreed that in case the tenant in whose premises the heating plant is located, vacates it, he will pay any extra expense resulting to the other tenant.<sup>54</sup> If the landlord, having expressly bound himself to repair, wilfully permits the premises to remain in such a condition, that it is impossible for the tenant to heat the premises

<sup>51</sup> Pryor v. Foster, 130 N. Y. 171, 41 N. Y. St. Rep. 320, 29 N. E. Rep. 123.

<sup>52</sup> Ryan v. Jones, 49 N. Y. St. Rep. 140, 20 N. Y. Supp. 842, 2

Misc. Rep. 65; Moore v. Goodwin, 161 Pa. St. 175, 28 Atl. Rep. 1018.

<sup>53</sup> New Era Mfg. Co. v. O'Reilly, 197 Mo. 466, 95 S. W. Rep. 322.  
<sup>54</sup> New Era Mfg. Co. v. O'Reilly, 197 Mo., 466, 95 S. W. Rep. 322.

it is an eviction.<sup>55</sup> Where the landlord agreed to place a furnace in the premises but there was no agreement as to the amount of heat it should give, the fact that, because of some defect in the pipe connection, it failed to heat according to its capacity does not constitute an eviction, as it would then be the duty of the tenant to remedy the defect as it could be done at very small expense and charge the same to the landlord.<sup>56</sup> A loss resulting to a tenant because he could not work in the premises because of the failure of the landlord to heat them, as he had agreed, is not an element of damage when the tenant could have heated them himself at very little expense.<sup>57</sup>

**§ 679. The deprivation of easements.** There is no eviction solely because by some act of the landlord the tenant is deprived of an easement which rendered the building more pleasant or more convenient for his occupation.<sup>58</sup> Thus the piling up of bricks over a cellar grating by the landlord by which the circulation of air in the cellar is impeded or prevented is no eviction.<sup>59</sup> If, however, the interference with, or the deprivation of, the easement by the landlord results in some damage of so serious and so permanent a nature that the tenant is thereby prevented from using and enjoying the premises it is an eviction.<sup>60</sup> Thus the act of the landlord of a piece of land fronting on the water mooring vessels close to the bank of the stream by which the tenant, a boat club, was prevented from having free access to the land from the water of the stream and *vice versa* is a total eviction having in view the location of the premises and the use the tenant intended to make of them.<sup>61</sup> So, too, it has been held

<sup>55</sup> Leonard v. Armstrong, 73 Mich. 577, 41 N. W. Rep. 695. 389, 59 N. W. Rep. 163, 43 Am. St. Rep. 458; West Side Savings Bank

<sup>56</sup> Doolittle v. Selkirk, 7 Misc. Rep. 732, 28 N. Y. Supp. 43. v. Newton, 57 How. Pr. (N. Y.) 152; Seigel v. Neary, 77 N. Y. Supp. 854; Edmison v. Lowry, 3 S. D. 77, 52 N. W. Rep. 583, 17 L. R. A. 275, 44 Am. St. Rep. 774

<sup>57</sup> Ireland v. Gauley, 95 N. Y. Supp. 521. (tenant was deprived of free access to his premises by lumber piled in front of it by the landlord); Royce v. Guggenheim, 106 Mass. 201, 8 Am. Rep. 322.

<sup>58</sup> Williams v. Hayward, 1 El. & El. 1040, 102 E. C. L. 1040, 28 L. J. Q. B. 394, 5 Jur. (N. S.) 1417, 7 W. R. 563; Coleman v. Reddick, 25 U. C. C. C. 579; Hazlett v. Powell, 30 Pa. St. 293.

<sup>59</sup> Dimmock v. Daly, 9 Mo. App. 354. <sup>60</sup> Pridgeon v. Boat Club, 66 Mich. 326, 33 N. W. Rep. 502.

<sup>61</sup> Coulter v. Norton, 100 Mich.

that the obstruction by the landlord of the outer door of one of the tenant's rooms where the tenant occupied two rooms as offices is an eviction though the tenant had access through the other room.<sup>62</sup> So the conduct of a landlord in depriving the leased premises of lateral support as a result of which they become unsafe and dangerous and are ultimately demolished by the municipal authorities is an eviction.<sup>63</sup> The erection by an adjoining land owner on his own land of a wall which closes certain windows which furnished light and air to the demised premises is not an eviction, nor is it a defense to an action for the rent. If the vacant lot adjoining had belonged to the lessor at the time of leasing, then an easement of light and air would have arisen by implication in favor of the demised premises and the act of the owner in interfering with the light and air would be an eviction or a trespass according to the nature and extent of the interference with the light and air of the tenant. In either case it will be a breach of the implied covenant of quiet enjoyment.<sup>64</sup> The concealment by the lessor of the fact that the adjoining owner means to build an obstructing wall which fact is within the knowledge of the landlord when he signs the lease is not such fraud as will invalidate the lease. Mere silence as to such

<sup>62</sup> Hamilton v. Graybill, 19 Misc. Rep. 521, 43 N. Y. Supp. 1079, 26 Civ. Pro. Rep. 184.

<sup>63</sup> Snow v. Pulitzer, 142 N. Y. 263, 36 N. E. Rep. 1049 affirming 66 Hun, 329, 21 N. Y. Supp. 296.

In this case the court in substance said, when the tenant took his lease he at once became entitled to the premises as they were and had the right against his landlord to have the wall sufficiently supported by the adjacent buildings as they then were, as all the buildings were then held and owned by the landlord. The landlord in such a case has no more right to demolish the wall which gives support than he would have to enter on the demised premises and to remove

the roof of the same. Nor would the landlord be excused because at the date of making the lease he had no more knowledge that the wall of the demised premises was wholly dependent for support upon the wall of the premises adjacent to it and also owned by him. Though he was honestly mistaken he is responsible for his mistake which was no fault of the tenant. As soon as he learned that the wall he was demolishing supported the wall of the tenant's premise it was his duty to replace it or take the consequence of the actions.

<sup>64</sup> Hazlett v. Powell, 30 Pa. St. 293, 296; Story v. Odin, 12 Mass. 157.

material fact is not fraud though it may injure the tenant's rights.

**§ 680. The loss of the use of an elevator.** Where a landlord retains the possession and control of a freight or a passenger elevator used in the building leased, and the use by the tenant of the elevator is part and parcel of the premises demised and indispensable to the tenant's beneficial enjoyment of the same, the fact that the tenant is deprived of the use of the elevator by the landlord's mismanagement of the same is an eviction.<sup>65</sup> The same rule is of course applicable in a case where the landlord has expressly stipulated in the lease to furnish elevator service. The tenant is not bound to abandon the premises on the first breach of his stipulation to furnish elevator service by the landlord. He may wait a reasonable time for the landlord to run the elevator without waiving his right to claim an eviction,<sup>66</sup> based upon the failure of the landlord to run an elevator. A breach of an agreement by a landlord with his tenant to maintain an elevator in the demised premises may be interposed as a defense in an action for the rent. And when under a lease containing such an agreement the landlord in case of accident has a right to stop running the elevator for a reasonable time to make repairs, the question whether it has been stopped an unreasonable time is wholly for the jury.<sup>67</sup> Stopping the running of an elevator, might under some circumstances be an eviction. But generally under well recognized principals, mere irregularity in the management of the elevator, by which a tenant is put to inconvenience though it may be considerable, is not an eviction, where the inconvenience is not so great as to render the premises uninhabitable. Whether an eviction would exist is in this case as in all others, a question on all the facts and circumstances. If the tenant has other means of access to his apartments besides the elevator, and the discontinuance of the use of the elevator is only temporary, it could hardly be regarded as an eviction. But if, for example, the tenant's apartments were located at the top of a very high building, and the use of a stairway to reach it was a matter of great inconvenience, and

<sup>65</sup> Lawrence v. Mycenian Marble v. Williamson, 51 Minn. 53, 52 N. Co., 20 N. Y. Supp. 698, 48 N. Y. W. Rep. 986.

St. Rep. 719, 1 Misc. Rep. 105. <sup>67</sup> Ardsley Hall Co. v. Sirrett,

<sup>66</sup> Minneapolis Co-operative Co. 86 N. Y. Supp. 792.

particularly if the landlord had either expressly or by implication agreed to supply elevator service, a discontinuance of the running of the elevator if apparently permanent, would constitute an eviction.<sup>68</sup>

**§ 681. Shutting off water supply.** Where the use of water for any legitimate purpose of the tenant is a privilege or easement which constitutes an incident or an appurtenant of the demised premises the deprivation of the tenant of the use of the water by the active agency of the landlord is an eviction.<sup>69</sup> So it has been held that the action of a landlord of a building rented to separate tenants, who occupy the lower part of the premises, in shutting off the supply of running water from the upper stories of the building because the water pipes are out of order, and a tenant refuses to repair them, is an eviction, and the tenant may abandon the premises, for the circumstances of the case, particularly the fact that the premises are let out in separate tenements, and that the landlord has the control of the source of water supply, raise by implication an implied agreement on the part of the landlord to supply his tenants with running water which is conclusive when taken in connection with the fact that he had always done so in the past, and that there was no expressed contract to the contrary.<sup>70</sup> The non-supply of water for the premises caused by a leak in a pipe outside of the demised premises, which the landlord after notice of the leak neglected to repair after a request by the tenant that he should do so by reason of which the water closet and wash basin on the demised premises became useless whereupon the tenant

<sup>68</sup> A failure on the part of the landlord to furnish elevator service as he is bound to do, is not an eviction where it caused the tenant only slight inconvenience and only a small loss in his business. This is particularly true where the loss of elevator service is long continued and has been quietly submitted to by the tenant. *Delmar Inv. Co. v. Blumenfeld*, 118 Mo. App. 308, 94 S. W. Rep. 823. But the failure to furnish elevator service where it is

willful may be an eviction if the elevator was in actual use in the building and the withdrawal of the service results in permanently and materially diminishing the benefit which the tenant derives from his occupation of the building.

<sup>69</sup> *West Side Savings Bank v. Newton*, 76 N. Y. 616, 57 How. Pr. (N. Y.) 152, 8 Daly, 332.

<sup>70</sup> *West Side Savings Bank v. Newton*, 57 How. Pr. (N. Y.) 152, 76 N. Y. 616, 8 Daly, 332.

abandoned the premises is not an eviction excusing the payment of rent, where there was no actual interference by the landlord with the supply and no covenant on his part that he would keep up the supply of water, or that he would keep the premises in repair, or that the demised premises should remain in the same condition as they were at the date of the execution of the lease.<sup>71</sup>

**§ 682. Presence of vermin and noxious smells.** The presence of vermin upon the premises or of disagreeable and noxious smells does not *per se* constitute an eviction unless their presence is attributable to some act of the landlord during the term.<sup>72</sup> Thus, for example, the act of the landlord letting loose or driving upon the premises a number of rats or mice, or maintaining adjacent thereto a bone boiling plant the odors from which render the premises uninhabitable, might constitute an eviction. But for vermin on the premises or bad smells arising from causes existing when the term began the landlord is not liable.<sup>73</sup> On the other hand it has been held that the existence of an offensive smell upon the premises which was so strong in the morning when the premises were opened by the tenant's employees, that they could not enter until it was dissipated and which at times was intolerable, may be an eviction when the smell arose from defective plumbing which the landlord was bound to repair and where the tenant had notified him to do so.<sup>74</sup> So, too, a tenant whose family has been made sick by defective plumbing which the landlord has failed to repair though he is bound and has been notified to do so may abandon the premises and allege an eviction.<sup>75</sup>

<sup>71</sup> Coddington v. Dunham, 35 N. Y. Sup. Ct. 412.

<sup>72</sup> Pomeroy v. Taylor, 9 N. Y. St. Rep. 514.

<sup>73</sup> Truesell v. Booth, 4 Hun (N. Y.) 100; Vanderbilt v. Persse, 3 E. D. Smith (N. Y.) 428; Smith v. Marrable, 11 M. & W. 5.

<sup>74</sup> St. Michaels Prot. Epis. Church v. Behrens, 10 N. Y. Civ. Pro. Rep. (N. Y.) 181, 188.

<sup>75</sup> Bradley v. De Goicouria, 12 Daly, 393, 67 How. Prac. Rep. 76; Beach J. dissenting. See, also,

as to noxious smells from defective sewerage, Marks v. Delaglio, 59 N. Y. Supp. 707, and McCoull v. Herzberg, 33 Ill. App. 542. Foul odors from defective plumbing which menace health and comfort and the cause of which the landlord refuses to remove render the premises uninhabitable under Laws 1860, c. 345 giving the tenant the right to leave the premises. Lathers v. Coates, 41 N. Y. Supp. 373, 18 Misc. Rep. 231. See, also, Thalheimer v. Lempert,

**§ 683. The failure of the landlord to repair.** Where a landlord who is bound either by the statute law of the state or by the express provisions of the lease to make repairs so far neglects his legal or contractual duty that the premises thereby be-

49 Hun, 606, 1 N. Y. Supp. 470. The lessor has no easement in the use of a sewer which runs underneath the premises. If he renders the premises untenantable by repeatedly filling up an open sewer situated beneath the premises, it is an eviction which will justify the tenant in abandoning the premises. *Sully v. Schmitt*, 147 N. Y. 248, 41 N. E. Rep. 514, 4 Ann. Cas. 71. See 11 N. Y. Supp. 694. The liability of the landlord for damages to the tenant and to the members of his family caused by defective sewerage was exhaustively considered in the case of *Chadwick v. Woodward*, 13 Abb. N. C. (N. Y.) 441. In that case it was held that a tenant in an action against him to recover rent could not claim damages for sickness to himself and family resulting from the escape of sewer gas where the landlord was not shown to have been guilty of any wrongful concealment of the facts regarding the condition of the premises at the time of making the lease upon the ground that there was no implied covenant on the part of the landlord that the sewerage was in good condition. The court said "That there may exist such a deception, either by suppression of the truth or a suggestion of falsehood, is not questioned, as when a landlord lets premises which are infected by a contagious dis-

ease (*Minor v. Sharon*, 112 Mass. 477, 17 Am. Rep. 122; *Caeser v. Karutz*, 60 N. Y. 229, 19 Am. Rep. 164), or the presence of a stench, proceeding from an unknown cause, which makes the premises untenantable (*Wallace v. Lent*, 1 Daly (N. Y.) 481) or the fact that the house had been previously used as a house of prostitution but in view of the pleadings and the proof, and the express disclaimer of any blamable or wrongful concealment, it cannot be claimed that the case at bar could be brought within this category. He hired the premises with full knowledge of these connections, and the landlord is not chargeable with such consequential injuries as may arise from any defect that time and use produce. Under such circumstances smells and even sickness are not only not extraordinary but are inevitable, and I fail to see how this furnishes any ground of action against the landlord. The party who hires has an opportunity to examine the house, and he can examine the plumbing as well as the walls, in so far as it can be examined at all, and he has possibly as much knowledge as the lessor, for there is no implied covenant as to plumbing any more than of plastering or of tinning. In one sense it may be said that it is concealed, and the tenant could not tell what he was hir-

come untenantable the tenant may treat his neglect as an eviction and promptly abandon the premises.<sup>76</sup> In all cases however, where a failure to repair is alleged to be an eviction it must be proved that the landlord was bound to repair and that the tenant abandoned the premises compulsorily because of the fail-

ing, but the same may be said of nearly all the carpenter work, the brick work, and nearly every portion of the building of a substantial character. The charge of concealment and deception in this class of cases is undoubtedly an outgrowth of anger which has its source from the painful results of such defects, but the law in its present state furnishes no remedy to the tenant that I know of, and it rests with the Legislature to make landlords and builders liable in such cases; for the common law throws the responsibility upon the tenant, and I know of no provision which exempts the plumbing or the sewer fixtures from these well settled provisions. In a Massachusetts case (*Foster v. Peyser*, 63 Mass. 242) where the lease declared that the house was in perfect order, and a defective drain which produced a disagreeable stench was subsequently discovered, it was held that the lease had reference only to the condition of the house as an edifice, and not the present and future purity of the air within it. As matter of fact, the condition of pipes and of plumbing in a house is easily determined, and it is not claimed in the case at bar that there existed any secret or hidden source of danger to the health, except such as would naturally arise from unrepaired pipes. The mere fact that these

pipes are connected with an unhealthy sewer that causes fetid odors, in no sense creates greater liability on the part of the plaintiff than if there were no such connections and no such odors. Neither does that fact establish higher rights in favor of the tenant in cases like the present, where the party hires with full opportunity to examine the premises, and with knowledge that the connecting pipes opened into the sewer. That there exists any implied warranty on the part of a landlord in renting a house that sewer gas shall not escape and make the house unhealthy is wholly wanting in precedent and analogy, and as stated above, there is no implied warranty in lease that it is fit for the use to which it is designed by the tenant, or even that a dwelling house is habitable."

<sup>76</sup> *Bissell v. Lloyd*, 100 Ill. 214, 216; *Bostwick v. Losey*, 67 Mich. 554, 559, 35 N. W. Rep. 246; (repairs to a water mill) *Pierce v. Joldersma*, 91 Mich. 463, 466, 51 N. W. Rep. 1116; *Young v. Collett* (Mich. 1886), 6 N. W. Rep. 115; *Tollman v. Murphy*, 120 N. Y. 345; *Bradley v. Goicouria*, 12 Daly (N. Y.) 393, 67 How. Pr. (N. Y.) 76, 79, Beach, J. dissenting; *St. Michael's P. E. Church v. Behrens*, 10 N. Y. Civ. Pro. Rep. 181, 189; *J. Prior v. Sanborn Co.*, 12 S. D. 86, 80 N. W. Rep. 869.

ure of the landlord to perform his duty to repair. The landlord's failure to repair falling short of this in its scope and result is not an eviction even though it may be actionable as a breach of a covenant.<sup>77</sup> When, however, the repairs which must be made in the premises are such as it is the duty of the tenant to make, either under the law or by a stipulation contained in the lease the tenant is not regarded as evicted though the landlord does not make the necessary repairs, and the premises become uninhabitable by reason of the need of repairs.<sup>78</sup> Under this rule if the tenant of an apartment agrees to keep the plumbing in repair, he cannot plead an eviction because of the existence of sewer gas, endangering his life and health, by reason of which he had to leave the premises unless he shows that the plumbing in some portion of the building under the control of the landlord, was in a defective and dangerous condition.<sup>79</sup> For the refusal of a landlord to remove defective plumbing which he has put into a dwelling-house after the tenant had gone into

<sup>77</sup> *McFarlane v. Pierson*, 21 Ill. App. 566; *Barrett v. Boddie*, 158 Ill. 479, 484, 42 N. E. Rep. 143, 49 Am. St. Rep. 172; *Biggs v. McCurley*, 76 Md. 409, 415, 25 Atl. Rep. 466; *Speckels v. Sax*, 1 E. D. Smith (N. Y.) 253; *Edgerton v. Page*, 5 Abb. Prac. Rep. (N. Y.) 1; reversing 12 How. Prac. Rep. (N. Y.) 58; *Alger v. Kennedy*, 49 Vt. 109, 119, 24 Am. Rep. 117; *Blake v. Dick*, 15 Mont. 236, 38 Pac. Rep. 1072.

<sup>78</sup> *Eisenhardt v. Ordean*, 3 Colo. App. 162, 32 Pac. Rep. 495; *Barrett v. Boddie*, 158 Ill. 579, 42 N. E. Rep. 143, 49 Am. St. Rep. 172; *Crawford v. Redding*, 8 Misc. Rep. 306; *Truesdell v. Booth*, 4 Hun (N. Y.) 100, 102; *Barnum v. Fitzpatrick*, 27 Abb. New Cases (N. Y.) 334; *Alger v. Kennedy*, 49 Vt. 109, 24 Am. Rep. 117. See, also, *Piper v. Fletcher*, 115 Iowa, 263, 88 N. W. Rep. 380.

<sup>79</sup> *Sutphen v. Seebas*, 14 Abb. New Cases 67, 12 Daly, 139; *St. Michael's Prot. Episc. Church v. Behrens*, 13 Daly, 548, 10 Civ. Pro. Rep. 181. The roof of the demised house leaking so that the walls became damp causing sickness in the family of the tenant by reason of which the tenant abandoned the premises is not an eviction where the tenant had agreed to repair and the landlord had not. *Truesdell v. Booth*, 6 Thomp. & C. 379, 4 Hun (N. Y.) 100, 102. Where a landlord at the request of the tenant in an attempt to make the roof of the premises more secure removes a portion of a floor, the material of which is rotten and hence is not fit to be replaced, the landlord's failure to restore the floor to its former condition is not an eviction. *McMann v. Autenrieth*, 17 Hun, 163.

possession, is an eviction.<sup>80</sup> And where owing to the defective condition of the plumbing work of an apartment house, sewer gas escapes into an apartment and endangers the health of the tenant and his family, and the landlord fails to comply with the orders of the Board of Health, to remedy the defect, there is an eviction which justifies the tenant in abandoning the premises.<sup>81</sup> Hence if from defects in the construction of the premises, they cannot be properly heated or if from defects in plumbing, of which the tenant had no knowledge when he made the lease, sewer gas escapes, the tenant and his family become sick from such causes, and the house itself becomes untenantable, the tenant is not compelled to remain and pay rent. He may vacate the premises after he finds them unfit for the purpose for which he rented them.<sup>82</sup> In England it has been held that damage accidentally happening to the personal property of a tenant by a break in a water pipe is not an eviction or a breach of an express covenant for quiet enjoyment. One of the several tenants of a flat house whose goods are damaged by the bursting of a water pipe on an upper floor, cannot recover damages against his landlord on a covenant by the latter that the tenant might "peacably hold and enjoy the said demised premises during the said term without any interruption by the lessor or any person lawfully claiming through or in trust for him." Such a covenant is prospective and there was no act of omission or commission proved on the part of the landlord during the term. In such cases where the source of supply of the water is under the control of the landlord it is sufficient to excuse the landlord if the water apparatus is reasonably fit and proper for the purpose and if there is no negligence or lack of skill on the part of the landlord, he is not liable.<sup>83</sup> If the landlord is proved to have been negligent in caring for plumbing which is exclusively under his control it is a different matter. His negligence may constitute circumstances an eviction which would not otherwise be an eviction. A landlord who neglects to keep in order the

<sup>80</sup> Thialheimer v. Lempert, 17 N. Y. St. Rep. 346, 1 N. Y. Supp. 470.

Lack v. Wyckoff, 11 N. Y. St. Rep. 678.

<sup>81</sup> Bradley v. De Goicouria, 14 Abb. New Cases (N. Y.) 53, 12 Daly, 393, 66 How. Pr. (N. Y.) 77;

<sup>82</sup> Leonard v. Armstrong, 73 Mich. 577, 581.

<sup>83</sup> Anderson v. Oppenheimer, 49 L. J. Q. B. 708, 5 Q. B. D. 602.

plumbing in rooms under his control, by reason of which a tenant of a lower or of an adjoining room, receives damages from an overflow of water, is liable therefor either upon the theory of a breach of the covenant of quiet enjoyment which is implied, or upon his failure to keep his promise to remove the cause of the damage.<sup>84</sup>

**§ 684. Interference by the landlord with sub-tenants.** The conduct of the landlord in preventing a tenant from subletting, or in interfering with sub-tenants is an eviction of the tenant where the lease contains no provisions forbidding subletting. This may occur where a landlord refuses to allow a sub-tenant to enter upon the premises,<sup>85</sup> or compels him to vacate,<sup>86</sup> or forbids the sub-tenant to pay any more rent to his immediate landlord and collects the rent himself,<sup>87</sup> or distrains the chattels of the sub-tenant.<sup>88</sup>

**§ 685. The entry of the landlord to rebuild or to repair.** The entry upon the demised premises by a landlord who has expressly covenanted to make repairs or to rebuild in case of a total or a partial destruction of the premises by fire or any other casualty is not an eviction even though it may be without the consent of the tenant then occupying the premises.<sup>89</sup> The obligation of the landlord upon his covenant to repair or to rebuild by implication confers upon him the right to enter upon the premises for that purpose and to remain there for a reasonable time either in person or by an agent or contractor causing the tenant as little inconvenience as possible. The intention of the landlord in such entry, which is at the most a mere trespass, is to benefit the tenant by restoring to him at the expense of the landlord the absolute free and beneficial use of the premises of which he has been deprived. The same rule would of course

<sup>84</sup> Vann v. Rouse, 94 N. Y. 401.

<sup>85</sup> Rowbotham v. Pearce, 5 Houst. (Del.) 135; Randall v. Alburtis, 1 Hilt. (N. Y.) 285; Doran v. Chase, 2 W. N. C. (Pa.) 609.

<sup>86</sup> Burn v. Phelps, 1 Stark. 94, 2 E. C. L. 44.

<sup>87</sup> Leadbetter v. Roth, 25 Ill. 587.

<sup>88</sup> Lewis v. Payn, 4 Wend. (N. Y.) 423.

<sup>89</sup> Cook v. Anderson, 85 Ala. 99,

4 So. Rep. 713; Nonotuck Silk Co. v. Shay, 37 Ill. App. 542, 547, 548; Kellenberger v. Foresman, 13 Ind. 475; McClenahan v. City of New York, 102 N. Y. 75, 5 N. E. Rep. 793; Willcox v. Philadelphia etc. Co., 15 W. N. Cas. (Pa.) 367; Conn. Mu. L. Ins. Co. v. United States, 21 Ct. Cl. 195; Izon v. Gorton, 5 Bing. N. C. 501

apply where the landlord enters to repair the ravages of ordinary wear and tear as well as to rebuild. If the tenant shall consent to the entry there is not even a trespass much less an eviction.<sup>90</sup> The duty to repair imposed by the lease upon the landlord carries with it the right to enter and to occupy the premises for a reasonable time for that purpose.<sup>91</sup> An entry and occupation of a part of the premises by the lessor for the purpose of making repairs, required by a Municipal Corporation and ordered by a court, is not an eviction, particularly where the landlord is given the right to enter to make necessary repairs by a clause in the lease. Where a landlord is expressly given the right to enter for any purpose there is no trespass or eviction so long as he enters solely for such purpose and remains upon the premises only long enough to accomplish such purpose.<sup>92</sup> If the lessee has agreed to repair, and the lessor after the lessee has refused to repair, enters upon the premises and makes the repairs required to be made by an order of the municipal authorities served upon both the lessee and the lessor, it is no eviction.<sup>93</sup> If the landlord is bound to repair or to rebuild, in case of the destruction of the premises, or, if no rent is to be paid by express agreement or under some statutory provision while the premises are unfit for occupancy<sup>94</sup> and the landlord must therefore repair or rebuild before he can again collect rent, the giving or withholding of the consent of the tenant seems to be not material upon the question of whether the entry by the landlord is a

<sup>90</sup> Cook v. Anderson, 80 Ala. 99, 4 So. Rep. 713; Peterson v. Edmonson, 5 Har. (Del.) 378; Alexander v. Dorsey, 12 Ga. 12, 56 Am. Dec. 443; Ludington v. Seaton, 66 N. Y. Supp. 497, 32 Misc. Rep. 736; Olson v. Schevlovitz, 91 App. Div. 405, 86 N. Y. Supp. 834, 836; Robinson v. Henaghan, 92 Ill. App. 620; Rosenbloom v. Finch, 37 Misc. Rep. 318, 76 N. Y. 902; Heller v. Royal Insurance Co., 151 Pa. St. 101, 25 Atl. Rep. 83.

<sup>91</sup> Smith v. McLean, 22 Ill. App. 451 affirmed in 14 N. E. Rep. 50,

51, 123 Ill. 210 and see also, Nonotuck Silk Co. v. Shay, 37 Ill. 542.

<sup>92</sup> Ernst v. Strauss, 99 N. Y. Supp. 597.

<sup>93</sup> Markham v. David Stevenson Brewing Co., 64 N. Y. Supp. 617, 51 App. Div. 463 affirmed in 169 N. Y. 593, 62 N. E. Rep. 1097. As to the liability of a landlord for the act of his contractor constituting an eviction see Wusthoff v. Schwartz, 32 Wash. 337, 73 Pac. Rep. 407.

<sup>94</sup> Smith v. McLean, 22 Ill. App. 451 affirmed in 14 N. E. Rep. 50, 51, 123 Ill. 210.

trespass or eviction.<sup>95</sup> Under all such circumstances where the landlord is under a contractual or statutory obligation to repair or to rebuild the permission to his entry by the tenant will be implied. Under some circumstances the entry of the landlord upon the premises and his making alterations and repairs therein without the consent of the tenant will constitute an eviction. While mere entry to make repairs will not ordinarily constitute an eviction if the repairs do not occupy an unreasonable time or operate as an actual ouster of the tenant from some material part of the premises, alterations, whether more or less extensive, would ordinarily constitute an eviction particularly if the purpose of such alterations is to substantially change the character and form of the demised building or apartments and render their use less valuable to the tenant. If the alterations and repairs are made without the consent of the tenant and interfere with his substantial enjoyment of the use of the premises they are an eviction.<sup>96</sup> Whether the interference with the tenant's use of the premises is substantial is usually a question for the jury to determine taking into consideration the extent of the alteration and repairs, the time occupied in making them and the use of the premises by the tenant.<sup>97</sup> Generally all alterations which substantially prevent or interfere with the tenant's free access to his apartments are an eviction.<sup>98</sup> The entry of a landlord upon the premises where he proceeds to erect an addition to the rear of the premises removing steps and by this preventing access to the same and also excavates to the depth of several feet for the purpose of placing the foundation for the addition by which, in connection with other acts of the landlord resulting

<sup>95</sup> But see to the contrary *Hoeveler v. Fleming*, 91 Pa. St. 322; and *Heller v. Royal Insurance Co.*, 151 Pa. St. 101, 25 Atl. Rep. 83, 84, 30 W. N. C. 545 in which cases an entry to rebuild by the landlord without the consent of the tenant was held to be an eviction.

<sup>96</sup> *Adams v. Werner*, 120 Mich. 432, 79 N. W. Rep. 363; *Goebel v. Hough*, 26 Minn. 252, 2 N. W. Rep. 847.

<sup>97</sup> *Hall v. Irwin*, 78 App. Div. 107, 11 Ann. Cases 143, 79 N. Y. Supp. 614 reversing 38 Misc. Rep. 123, 77 N. Y. Supp. 91 (where the access of the tenant to his apartments upon an upper floor of the building was so interfered with that it was dangerous for him to use the stairs and elevators).

<sup>98</sup> *Seigel v. Neary*, 38 Misc. Rep. 297, 77 N. Y. Supp. 854.

in destroying a chimney, the lodgers of the lessee are seriously inconvenienced and some of them are compelled to remove their belongings and surrender their lodgings, is an actual eviction.<sup>2</sup> It is competent for the lessee in the lease to waive, by an express covenant, any claim he may have for an eviction based upon repairs or alterations made or to be made by the landlord. Thus where a lease provides that the lessor may enter to make repairs, and that he shall not be responsible to the lessee for any damages resulting thereby, the facts that the premises were rendered absolutely untenantable by the landlord's action in repairing, will not enable the tenant to set up an eviction.<sup>1</sup> Such a covenant on the part of the tenant will ordinarily be strictly construed and its application limited. It will not be construed to permit the landlord to make very extensive alterations which result in the tenant being deprived of the use of the premises permanently.<sup>2</sup>

**§ 686. Use of adjoining lots.** The mere building upon or other improvement of a vacant lot adjoining the premises by which the demised premises were rendered less commodious of occupation or less suitable to the use of the tenant does not affect the right of the landlord to his rent nor authorize the tenant to abandon the premises. This is not an eviction. So where a lessor demised a house in which were windows opening on an adjoining vacant lot, the erection of a wall by the adjoining owner is in no case an eviction.<sup>3</sup> For the acts of third persons on their own premises which deprive the tenant of his full enjoyment of the premises, are not an eviction so far as the landlord is concerned.<sup>4</sup> Thus the removal of a building on another and adjoining lot, owned by another person, by reason of which one side of the premises leased was unprotected from the weather, causing damages to the goods of the tenant, does not give the tenant an action against the landlord for an eviction.<sup>5</sup> Neither

<sup>1</sup> Osmers v. Furey, 32 Mont. 581, 81 Pac. Rep. 345.      Pr. 454, 43 How. Pr. (N. Y.) 433; Barns v. Wilson, 116 Pa. St. 303

<sup>2</sup> Mittelstadt v. Wulfers, 1 Misc. Rep. 215, 20 N. Y. Supp. 880.      "Oakford v. Nixon, 177 Pa. St. 76, 39 W. N. C. 49, 35 Atl. Rep. 588.

<sup>3</sup> Waite v. O'Neil, 76 Fed. Rep. 408, 22 C. C. A. 248, 34 L. R. A. 550.      Moore v. Weber, 71 Pa. St. 429, 4 Lanc. Bar. No. 1.

<sup>4</sup> Johnson v. Oppenheim, 12 Abb.

the erection of a party wall by an adjoining owner entirely closing up the windows in the leased premises, nor the lawful removal of a party wall by an adjoining owner with the erection of a new one which renders the demised premises uninhabitable, constitutes such an eviction of the tenant under a paramount title as will excuse him from the payment of rent.<sup>6</sup> The rules

<sup>6</sup> *Hazlett v. Powell*, 30 Pa. St. 293; *Dougerty v. Wagner*, 2 W. N. C. 291; *Barns v. Wilson*, 116 Pa. St. 303, 19 W. N. C. 467, 44 L. I. 357, 34 Pitts. L. J. 472, 4 Lanc. L. R. 247. The remedy of a tenant of an adjoining building for damages which arises from pulling down a party wall, is against the person who did it and not against his landlord, who had entered into a party wall agreement with such person. *Baugher v. Wilkins*, 19 Md. 35, 45; *Sigmund v. Howard Bank*, 29 Md. 324, 328. In *Hillard v. N. Y. & Cleveland Gas Co.* 41 Ohio St. 662, the court said, "If the demised premises had been destroyed during the term of the lease, the lessee—the Gas Coal Company—would doubtless have been discharged from the payment of rent. It was one of the covenants in the lease itself, that it should become void and determine, and all rent thereon should cease in the event of a destruction of the premises. And independently of the written covenant between the parties, as only two rooms in the building passed to the lessee, and no interest in the land, the subject of the demise would have been extinguished by the destruction of the building, and the liability to pay rent would thereby have been terminated. There would have remained nothing upon which the demise

could operate. *Winton v. Cornish*, 5 Ohio, 477; *Womack v. McQuarry*. 28 Ind. 103; *Kew v. Merchant's Exchange Co.*, 3 Ed. Ch. (N. Y.) 315; *Graves v. Berdan*, 26 N. Y. 498. In the case at bar, although the demised premises were not destroyed it is contended that they were so injured as to become unfit for occupancy, and that therefore there was no longer any obligation to pay rent to the lessors. There was no covenant by the lessor to keep in repair but the lessee covenanted to keep the premises in repair at its own expense and at the expiration of the term, to surrender them to the lessors in as good condition as the same were at the commencement of the lease, the natural decay and wear and loss by fire only excepted. It is to be presumed that the parties made their contract in contemplation of the ordinary action of the elements and of the situation and condition of the demised premises as patent to the ordinary observer. It would naturally be expected that a building might be erected at any time upon the adjoining vacant lot fronting on a prominent business street and thus cut off light and ventilation from that side. But obvious as that contingency was the lessee did not see fit to make provision for an abatement of rent or termination of the

of law in regard to the rights of adjoining owner to build upon their premises to the exclusion of light and air from the premises of their neighbors as above set forth, are admittedly applicable where the owners derive their respective titles from a common source. It has been attempted in some cases where the adjoining land is owned by the owner of the land which is leased to a tenant whose light and air is taken away by the erection of a building to distinguish this case from the general rule. But the courts have uniformly held that a landlord who owns a lot adjoining demised premises has a right to build upon the adjoining land and that his action in doing so by which the tenant is

lease, in case the owner of the vacant lot should construct a building thereon. The exclusion of light and air must have been foreseen as not improbable and the lessee covenanted to pay rent in full view of the existing and prospective state of things. Having thus covenanted to pay rent except only in the event of the destruction of the premises the lessee was bound by its agreement notwithstanding the subsequent change in the condition of the leased premises by the erection of the adjoining building. *Linn v. Ross*, 10 Ohio, 412. It was well said by the court in *Brown v. Curren*, 53 How. Pr. (N. Y.) 303. Building is not necessarily a cause of damage to an adjoining owner. And tenants themselves should take notice and be prepared for such contingencies of constant occurrence and make their arrangements accordingly. If the lessor had conveyed to the lessee a right to the unobstructed enjoyment of the light and air over the vacant lot for and during its term, they would have been answerable for that right in case of disturbance. But there was no

grant. And the vacant lot not belonging to the lessors at the time of the leasing it cannot be urged with any force of reasoning that an easement by implication in the passage of light and air followed a demise of the premises to the lessee. It is true, as said by Judge Story in *U. S. v. Appleton*, 1 Sumn. (U. S.) 249, that the general rule of law is that when a house or store is conveyed by the owner thereof, everything then belonging to, and in use for the house or store, as an incident or appurtenant passes by the grant. But it was never incident or appurtenant to the lessor's building, that the adjoining lot should always remain vacant, for the purpose of furnishing light and ventilation to the lessor's tenants. There is no evidence that the lessors, at the time of the demise, had any more knowledge than the lessee, of the intention of the owner of the adjoining land to put a building thereon. It is not claimed that there was any act amounting to an eviction on the part of the lessor."

deprived of light and air is not an eviction.<sup>7</sup> For in reason and good sense it cannot fairly be claimed that a landlord who owns an adjoining lot is any more restricted in the use which he may make of it than he would be if he did not own the demised premises which it adjoined. Hence it follows from this that the act of the landlord in building a wall upon a lot which adjoins the demised premises by which the windows of the tenant are obstructed and he is prevented from receiving light and air through them is not an eviction.

**§ 687. The acts of strangers are not usually an eviction.** The implied covenant that a lessee who holds under a lease from the owner of the fee, shall be entitled to the quiet enjoyment of premises during the term, does not extend to include protection from the acts of a trespasser. It is applicable only to the acts of the landlord, or of his agent, or of persons claiming through or under him, or in trust for him and to acts of persons claiming under a lawful and paramount title.<sup>8</sup> The tenant therefore cannot recover for an eviction resulting in his loss of the possession of the premises unless the eviction is caused by the landlord or by some person claiming under his title or by a third person claiming under a title paramount. The act of a stranger to the title neither procured nor assented to, by the landlord and for which the landlord is not responsible and which he has not as landlord expressly covenanted against, is not an eviction.<sup>9</sup> For the landlord's implied covenant of quiet enjoyment, a breach of which is an eviction, protects the tenant only against the acts of the landlord or his agents and the assertion

<sup>7</sup> *Palmer v. Wetmore*, 2 Sandf. (N. Y.) 316.

<sup>8</sup> *Baugher v. Wilkins*, 16 Md. 35, 45; *Sigmund v. Howard Bank*, 29 Md. 324; *Williams v. Gabriel*, 75 L. J. K. B. 149, (1906) 1 K. B. 155, 94 L. T. 17, 54 W. R. 379, T. L. R. 217 following *Sanderson v. Berwick-upon-Tweed Corporation*, 53 L. J. Q. B. 559, 13 Q. B. D. 547.

<sup>9</sup> *Warren v. Wagner*, 75 Ala. 188, 51 Am. Rep. 446; *Eisenhart v. Odean*, 3 Colo. App. 162, 32 Pac. Rep. 495, 496; *Billany v. Smith*,

4 Houst. (Del.) 113; *Blauvelt v. Powell*, 59 Hun, 179, 13 N. Y. Supp. 439, 20 Civ. Pro. Rep. 186; *Meeks v. Bowerman*, 1 Daly (N. Y.) 99; *De Witt v. Pierson*, 112 Mass. 8; *Gilhooley v. Washington*, 4 N. Y. 217; *Naglee v. Ingersoll*, 7 Pa. St. 185; *Hazlett v. Powell*, 30 Pa. St. 293, 296; *Carson v. Codley*, 26 Pa. St. 117; *State v. George*, 34 Ohio St. 657; *Manville v. Gay*, 1 Wis. 250, 60 Am. Dec. 379.

of a paramount title. It does not protect him against the acts of third persons and the tenant is bound to resist the encroachments of, or injuries inflicted by such persons and defend himself against all injuries they may seek to inflict upon him. The question often arises in cases where an eviction is claimed to what extent is a landlord liable for the conduct of a contractor whom he has engaged to repair or decorate the premises during their occupancy by the tenant. If the landlord himself makes the repairs, or if he makes the repairs by some one who is in fact and in law his agent or servant, and not an independent contractor, he may be liable for an eviction in the case of conduct which if proceeding from an independent contractor would not render the landlord liable for an eviction. The landlord is not liable for the conduct of an independent contractor amounting to an eviction, provided he has no control over the contractor and the landlord does not provide the means for the work. The tenant must then look to the contractor for his compensation in damages caused by an eviction which is the result of acts committed by him or by his employees.<sup>10</sup> On the other hand where by the instigation, direction or permission of the landlord, a third person does an act which ousts the tenant or deprives him of the beneficial enjoyment of the premises, it is an eviction which the tenant may plead against the landlord.<sup>11</sup> So where the landlord, without the consent of the tenant, leases the demised premises to a third person, the acts of the second lessee, in enforcing his rights under his lease are an eviction by the landlord as having been by implication authorized by the landlord.<sup>12</sup> The action of the landlord in protesting against the use of the leased premises for saloon purposes for which it had been expressly hired, is not a constructive eviction, though the protest of others

<sup>10</sup> *Talbott v. English*, 156 Ind. 299, 59 N. E. Rep. 857; holding also that the fact that repairs or improvements are made under the direction and subject to the approval of the architect of the landlord, as being in conformity with the contract does not divest the contractor of his independent character, nor impose on the landlord any liability for the wrong- ful acts of the contractor or of his employers.

<sup>11</sup> *Halligan v. Wade*, 21 Ill. 470, 74 Am. Dec. 108; *Bentley v. Sill*, 35 Ill. 414.

<sup>12</sup> *Conrad Seipp Brewing Co. v. Hart*, 62 Ill. App. 212; *Miller v. Michel*, 13 Ind. App. 190, 41 N. E. Rep. 467. Entry by new lessee into a part of the premises

would not have been sufficient to defeat the license unless the landlord had joined in.<sup>13</sup> A provision in a lease that on the violation of any of its provisions or covenants or of any of the rules of the house by the lessee the lease shall, at the option of the lessor, immediately be null, and the term granted shall cease and the lessor may re-enter without notice is a provision for the benefit of the lessor. The lessor is not bound to one lessee who is annoyed by the conduct of another which constitutes a breach of this covenant, to exercise his option to oust the objectionable tenant and his refusal or failure to do so is not an eviction of the tenant who has complained.<sup>14</sup> A tenant who leases property which is subject to an easement, takes it subject to the easement or servitude in the absence of an expressed contract with his landlord. Thus where the owner leased land upon which for many years there has stood a railroad viaduct, which the railroad company maintained there, by reason of condemnation proceedings and on agreement with a former owner and during the term, the railroad company had to make some extensive repairs, by reason of which the tenant was deprived of the use of a portion of his premises, it was held that this did not constitute an eviction as against the landlord.<sup>15</sup>

**§ 688. The acts of the municipal or public authorities.** The ousting of a tenant from possession of all or of a portion of the premises by the officers of the municipal government acting under a statute or ordinance is not an eviction for the reason that it is an act for which the landlord is not responsible. A tenant whose stands erected on the sidewalk in front of his premises are removed by the city as obstructions in a highway<sup>16</sup> or whose premises leased to him are removed by order of the authorities because the owner and landlord permits them to remain in an

<sup>13</sup> This case arose under a city ordinance which provided that the issue of a license to sell liquors might be prevented if the owners of certain lots should protest and the decision was passed upon the principle that the lessee had no right, interest or claim, in any property of the landlord except that which had been expressly

leased to him. *Kellogg v. Lowe*, 38 Wash. 293, 80 Pac. Rep. 458.

<sup>14</sup> *Sefton v. Juilliard*, 71 N. Y. Sup. 348.

<sup>15</sup> *Friend v. Oil Well Supply Co.*, 179 Pa. St. 290, 44 Pitts. L. J. 257,

<sup>16</sup> *McLarren v. Spalding*, 2 Cal. 510. See also *Burke v. Tindale*, 33 N. Y. S. 20, 12 Misc. Rep. 31.

unsafe condition<sup>17</sup> is not evicted. So a tenant who voluntarily on notice from the city removes his horses from the demised premises which he occupies as a stable, cannot sustain an allegation of an eviction.<sup>18</sup> The action of the landlord in doing certain work which effects a change in the grade of the street, under the authority of a municipal corporation and in pursuance of the power conferred by statute upon owners of property to do such work themselves under certain circumstances; is not an eviction, though the change of grade resulting, rendered access to the demised premises very inconvenient. The injury to the possession and enjoyment of the tenant which flows from a change of grade are only such as would have resulted had the change in grade been made by the city authorities and such injury gives neither an owner nor a tenant any right of action against any person who has lawful authority to make it.<sup>19</sup> The action of a landlord in obedience to a peremptory order of the city in proceedings to lay out a street, cutting away part of the buildings which was within the lines of the street, is not such an eviction as will render him liable to his tenant, although the statute under which the city acted was afterward declared unconstitutional.<sup>20</sup> So, also, an entrance on a leased house by a landlord solely for the purpose of placing fire escapes upon the premises in the performance of a duty imposed upon him, by a statute does not constitute an eviction inasmuch as it is clearly apparent that there is no intention on the part of the landlord to oust the tenant or to annoy him in any way.<sup>21</sup> In case a tenant who had the smallpox, which was not contracted by reason of his occupancy of the demised premises, is quarantined, the fumigation, repapering and repainting of his apartment by the land-

<sup>17</sup> *Hitchcock v. Bacon*, 118 Pa. St. 272, 283, 12 Atl. Rep. 352.

<sup>18</sup> *Forster v. Eberle*, 7 Misc. Rep. 490, 27 N. Y. Supp. 986. In this case no violation of any sanitary regulation was apparent. "Granting that the eviction was desirable to the defendants; that it accomplished their wishes and gave them an important advantage over the plaintiff in the matter of getting rid of him as a ten-

ant, still it was not their act. On the contrary it was the undoubted act of the city officials." By Green, J. in *Hitchcock v. Bacon*, 118 Pa. St. 272, 12 Atl. Rep. 352.

<sup>19</sup> *Gallup v. Albany R. R. Co.*, 65 N. Y. 1.

<sup>20</sup> *Dunn v. Mellon*, 147 Pa. St. 11, 23 Atl. Rep. 210.

<sup>21</sup> *Cassard v. Thornton*, 119 Ill. App. 397.

lord, under the order, of the municipal authorities, is not an eviction. All these things are the natural and necessary results of the tenant's sickness for which the landlord is in no wise responsible.<sup>22</sup> Following out the rule that the eviction must be the act either of the landlord or his agent, the inability of the tenant to obtain a renewal of his license for the sale of intoxicating drink upon his premises because the public official whose duty it was to grant licenses had been deprived of the power to do so in the particular case by the erection of a public school within a distance of the demised premises specified by statute is not an eviction.<sup>23</sup> A person who rents land within the city limits for a purpose which a city ordinance afterwards declares illegal cannot

<sup>22</sup> Beakes v. Hass, 36 Misc. Rep. 796, 74 N. Y. Supp. 843. It is readily conceivable how a landlord desiring to procure the possession of the premises and not attaching any value to the buildings thereon may, when the latter are out of repair deliberately permit them to become unsafe in order that they may be removed and the tenant thus ousted by the municipal authorities. Against such conduct on the part of the landlord the tenant's only protection is a covenant to repair for the authorities in performing their statutory duty are not the landlord's agent so as to make him liable for an eviction. On the other hand, a tenant, though his landlord may be bound to repair, cannot simulate an eviction by invoking the action of the municipal officials as a result of which the premises are demolished or their beneficial use by him prevented. His action will be construed to have been a voluntary abandonment of the premises which waives all claim of an eviction on his part.

<sup>23</sup> Miller v. Maguire, 18 R. I.

770; to the same effect see Kerley v. Mayer, 155 N. Y. 636, 49 N. E. Rep. 1099 affirming 10 Misc. 718, 31 N. Y. Supp. 818, 64 N. Y. St. Rep. 640. The action of the landlord in permitting contractors who are employed in making an excavation on an adjacent lot to enter the premises occupied by his tenant without the consent of such tenant to brace the wall, which permission rendered part of the premises useless to the tenant is not an eviction. In this case under a statute it was absolutely necessary for the owner and lessor to give such a permit in order that the contractor or the owner of the adjacent property should be bound to protect his building from injury. McKenzie v. Hatton, 141 N. Y. 6, 35 N. E. Rep. 929, affirming 24 N. Y. Supp. 70 Hun, 142, 53 St. Rep. 776. For other cases between the same parties involving the same issue see 9 Misc. Rep. 16, 29 N. Y. Supp. 18 and 15 Misc. Rep. 105, 36 N. Y. Supp. 473, and 26 N. Y. Supp. 873, 6 Misc. Rep. 153 overruling defendant's demur-  
rer.

refuse to pay rent.<sup>24</sup> A clause exempting a lessee from rent after the premises shall be destroyed by fire or some other unforeseen event does not exempt him where by a statute he is deprived of the use of the premises on Sundays, there being in the lease no express warranty against acts of the law.<sup>25</sup> An order made by the military authorities on an Indian reservation that the owner of buildings erected thereon should remove them, is not an eviction though the permission of such authorities was essential and had never been given. A tenant of the building cannot refuse to pay rent because of the order of removal which was never enforced and where the lessee continued to have full occupation of the premises with the knowledge and acquiescence of the military authorities.<sup>26</sup>

**§ 689. Whether annoyances caused by other tenants are an eviction.** The renting of premises by a landlord to a tenant who carries on therein a business which renders unpleasant and inconvenient the occupation of adjoining premises which were rented by the same landlord to another tenant, does not necessarily amount to an eviction of the tenant.<sup>27</sup> For generally it is no eviction merely because the use and enjoyment of the premises by one tenant are interfered with and his possession rendered unpleasant and inconvenient by the conduct of another tenant of the same landlord unless the landlord is in fact in some way connected with the tenant whose actions are unpleasant and disagreeable.<sup>28</sup> Accordingly the shutting off of the light and water from the apartments of one tenant by another tenant of the same landlord, is not an eviction of the former where it appears that they were tenants of the distinct premises and it does not appear that the landlord connived at or consented to the conduct of the latter tenant.<sup>29</sup> The fact that a co-tenant of the same landlord

<sup>24</sup> Chase v. Turner, 10 La. (O. S.) 19; Nicholls v. Byrne, 11 La. (O. S.) 170.

<sup>25</sup> Abadie v. Berges, 41 La. An. 281, 283, 6 So. Rep 529.

<sup>26</sup> Mayer v. Waters, 45 Kan. 78, 25 Pac. Rep. 212.

<sup>27</sup> Gray v. Gaff, 8 Mo. App. 329.

<sup>28</sup> Cougle v. Densmore, 57 Ill. App. 591; DeWitt v. Pierson, 112 Mass. 8.

<sup>29</sup> Conrad Seipp Brewing Co. v. Hart, 62 Ill. App. 212. The use by a tenant of his portion of a house leased to several tenants as a house of prostitution is not an eviction of the other tenants though a source of constant annoyance and discomfort where it does not appear the landlord had any connection therewith or even knowledge of it until the tenant

keeps in her apartments lewd women as lodgers, receives visits from drunken men and carries on therein a house of public prostitution, does not constitute an eviction though it is brought to the attention of the landlord, who promises but fails to remedy the evil. Even the fact that the disorderly proceedings in the house attracted crowds, together with the singing of bawdy songs and the loud talk of the occupants, does not make it an eviction or entitle the lessee to a diminution of the rent where he does not abandon the premises.<sup>30</sup> If it appears that the annoyance was permitted or encouraged by the landlord it may become a question for the jury, after this has been shown, to determine whether the character of the annoyance to the other tenant is such as to constitute an eviction.<sup>31</sup> In order that a tenant may abandon premises and escape the payment of rent upon the ground that a co-tenant in the same building is maintaining a house of prostitution which constitutes a nuisance and renders his premises untenantable, he must show that the landlord leased the premised knowingly for such purpose, or that he connived or consented to such use. The fact that the landlord fails to put

informed him of it after removing from the premises. *Gilhooley v. Washington*, 4 N. Y. 217, 3 Sandf. (N. Y.) 330.

<sup>30</sup> *DeWitt v. Pierson*, 112 Mass. 8, 17 Am. Rep. 58.

<sup>31</sup> *Chisolm v. Kilbreth*, 88 N. Y. Supp. 364. "There was no physical ouster in this case. The only question is whether the evidence offered shows such acts on the part of the plaintiff and the defendant as will constitute an eviction under the above definition. It does not appear on the evidence that the plaintiff let the rooms, the use of which is complained of, with the intent to disturb the defendant in his use and occupation. On the contrary the rooms were so occupied when the defendant's term began. Nor does it appear that the plaintiff at that time had any knowledge of

the alleged use made of the rooms, nor that any proof of such use was at any time given him. Even if any intent to evict may be presumed, as argued by the defendant, from the neglect of the agent to ascertain the facts, when notice was given him, it does not appear when notice was given, except that it was on three several occasions during the term, which was of eleven weeks duration. The evidence also fails to show that the defendant was in fact deprived of the use and occupation of the premises; he continued in actual use and occupation of the whole, during the eleven weeks, and at last yielded to a notice to quit for non-payment of rent." By Endicott, I. in *DeWitt v. Pierson*, 112 Mass. 8, on p. 11, 17 Am. Rep. 58.

out the co-tenant who is carrying on the immoral business is no defense to the tenant for he has the same remedy at law for the nuisance against the co-tenant as the landlord has.<sup>32</sup>

**§ 690. Objectionable occupancy of adjoining premises by permission of the landlord.** The act of the landlord in letting adjacent rooms or other premises owned by him to lewd women or disorderly persons, knowing the purpose for which they will be used, may constitute an eviction when by reason of the noisy and offensive conduct of such persons the tenant is seriously and permanently injured in his enjoyment of the premises.<sup>33</sup> So the conduct of the landlord himself who occupies other premises in the same house in bringing into the house lewd women who were guilty of such boisterous and improper conduct that it was intolerable for a respectable family to remain in the portion of the premises occupied by the tenant in consequence of which he and his family abandoned the premises may amount to an eviction.<sup>34</sup> It must appear, however, that the landlord is in some

<sup>32</sup> Cougle v. Densmore, 57 Ill. App. 591, 593; DeWitt v. Pierson, 112 Mass. 8, 17 Am. Rep. 58; Gilhooley v. Washington, 4 N. Y. 217, affirming 5 N. Y. Super. Ct. (Sandf.) 330.

<sup>33</sup> Lay v. Bennett, 4 Colo. App. 252, 35 Pac. Rep. 748.

<sup>34</sup> Dyett v. Pendleton, 8 Cow. (N. Y.) 727, 734, reversing 4 Cow. (N. Y.) 481; but compare in connection with this case Vanderbilt v. Persse, 3 E. D. Smith (N. Y.) 727; and the remarks of Gray, J. in Royce v. Guggenheim, 106 Mass. 201, 8 Am. Rep. 322; Etheridge v. Osborn, 12 Wend. (N. Y.) 532; Ogilvie v. Hall, 5 Hill (N. Y.) 84; Gilhooley v. Washington, 4 N. Y. 219. In Dyett v. Pendleton, 8 Cow. (N. Y.) 764, the court likens the action of a landlord who permits a lewd and disorderly tenant to annoy other tenants, to his establishing a hospital for the small-pox, the plague or the yellow

fever in the house or to his storing gunpowder or other dangerous and pestilential materials on the premises. But the case of the lewd tenant points more strongly to an eviction than the instances cited for in that case there is an actual and real interference with the tenant's enjoyment, while in the other cases the danger though present, has not actually prevented the enjoyment of the premises and may readily be abated on the tenant's application to the public authorities. So where a landlord permits gambling, and unseemly sports and profane and obscene language in the remaining portion of the building which is carried on until late at night and by which the tenant and his family are so greatly annoyed and inconvenienced that they are obliged to leave the premises it is an eviction. Rowbotham v. Pearce, 5 Houst. (Del.) 135.

way responsible for this nuisance. Either he must have permitted or consented to the immoral use which may be conclusively presumed from his having leased the premises to the immoral occupant with a knowledge of the use intended, or from his failure or neglect to remedy the evil after the tenant who has been injured thereby has called it to his attention and requested that it be abated.<sup>35</sup> It is not always necessary that the objectionable use of premises by a landlord or with his consent which is claimed to be an eviction shall be an illegal or an immoral use. If the landlord leases a portion of his house for a particular use by a tenant and subsequently leases another portion of it to another tenant for a use by the latter which will totally deprive the former of the benefit which he expected to derive from his apartments it is no defence where an eviction is claimed by the tenant, for the landlord to show that the use to which the second tenant was to put his premises was lawful. Thus where the establishment and maintenance of a public laundry upon the premises with the authority and consent of the landlord brought about such a change in the condition of a portion of the premises occupied by another tenant for use as a florist's establishment and for dwelling purposes that his beneficial use of the same was prevented, it is an eviction. If the building is by reason of its location and character unfit for use as a public laundry, and if the use of a portion of it as such by one tenant deprives other tenants of their rights, it is not material that the business of a public laundry is lawful and that the particular

<sup>35</sup> *Townsend v. Gilsey*, 1 Sweeney (N. Y.) 155, in which it was held that use for an immoral purpose and the adjoining tenant's consequent annoyance is not an eviction unless the letting was for that purpose or the landlord knew the premises would be used for an immoral purpose. To the same effect *DeWitt v. Piereson*, 112 Mass. 8, 17 Am. Rep. 58; *Cougle v. Densmore*, 57 Ill. App. 591, 593; *Gilhooley v. Washington*, 4 N. Y. 217. The renting of adjoining premises by the same landlord for a

purpose which renders the use of the demised premises very inconvenient to the tenant does not amount to an eviction nor does it in the absence of an express provision to that effect relieve the tenant from paying rent. The tenant stabled horses in the demised premises which were in danger by reason of the smoke, smell and great heat coming from the adjoining premises. *Gray v. Goff*, 8 Mo. App. 329, 332-334, repudiating *Dyett v. Pendleton*, 8 Cow. (N. Y.) 727, as overruled by later New York cases.

laundry was as well conducted as any laundry could be.<sup>36</sup> The leasing of a room on a lower floor for the sale and storage of automobiles, is an eviction of a tenant who has a room for studio purposes on an upper floor, because the business, on the lower floor however carefully conducted by the lessee, would necessarily render the upper tenant's apartment unfit for occupancy and enjoyment for studio purposes. A stipulation which exempted the lessor from any liability for the acts or neglect of co-tenants or other occupants, does not apply to such a condition of affairs because such a stipulation cannot possibly be intended to include the natural and regular carrying on of the business operations of tenants of other portions of the building, whose leases are subsequent to the lease in which this stipulation is contained.<sup>37</sup>

**§ 691. The acts of a servant or agent of the landlord.** The act which constitutes an eviction or a trespass may be the act of the landlord *in proprio personam* or it may be the act of the servant, agent or employee of the landlord. The doctrine contained in the maxim *qui fecit per aliam fecit per se* would apply and the landlord would be liable as a principal for the misfeasance or tort of his agent done within the real or apparent scope of his authority upon the general rules of the law of agency. For direct or express proof that the act which it is charged is an eviction was expressly commanded to be done by the landlord or was done with his previously given consent is never required. Such proof though always desirable to be had is very seldom obtainable by the tenant. Hence the agency or rather the fact that the actual perpetrator of the eviction was carrying out the will and intention of his landlord must often be inferred wholly from the circumstances. The nature or character of the act itself, taken in connection with the relation of the landlord to him who does it, the employment of the agent in the business of the landlord, the acquiescence of the landlord in former acts, accompanied by proof of facts which reasonably show that the landlord knew the act had been done, or was being done, together with the absence of objection on his part are for the consideration of court or jury in determining whether the landlord

<sup>36</sup> Duff v. Hart, 16 N. Y. S. 163,  
40 St. Rep. 676.

<sup>37</sup> Wade v. Herndl, 127 Wis. 544,  
107 N. W. Rep. 4.

commanded, assented to or ratified the tortious act which is relied on by the tenant as an eviction.<sup>37a</sup> Because of the rule that the conduct of a servant of the landlord must be assented to by the landlord, the mere negligent performance by a janitor of a building of his duties, or his disagreeable and annoying actions in certain petty matters in his relations towards the tenants, do not constitute such a state of affairs as will justify a tenant in abandoning his premises on the grounds of an eviction. There is a presumption that the annoying and disagreeable conduct of the janitor outside the scope of his duties has not been commanded by the landlord or at least that it is without his knowledge. It is for the tenant to show in the case of petty annoyance by a janitor or other employe of the landlord that they amount to an eviction according to the definitions given in the case and that he has abandoned the premises on that account and furthermore that the landlord has permitted or condoned the action of his servant. Remaining in possession of the premises and quarreling with a janitor who is disposed to make things disagreeable for the tenant does not constitute an eviction.<sup>38</sup> An actual entry under a paramount title though not under a judgment is an eviction where the tenant abandons the premises. So where a mortgagee out of possession enters upon the demised premises under a provision or statutory rule permitting him to

<sup>37a</sup> Warren v. Wagner, 75 Ala. 188, 203, 51 Am. Rep. 446; Gimon v. Terrell, 38 Ala. 208; Wusthoff v. Schwartz, 32 Wash. 337, 73 Pac. Rep. 407 (contractor making repairs for landlord); Hyman v. Jockey Club Wine Co., 9 Colo. App. 299. "The duty and obligation of the tenant to pay rent result from his beneficial enjoyment of the premises, unmolested by the landlord. There is a molestation relieving him from the duty and obligation, whenever the landlord, personally or through the act of another, however quietly, enters upon, and possesses himself of the premises, or any part thereof. The possession it-

self, taken and continued, though it may be in the absence, and without the knowledge of the tenant, is inconsistent with his possession and beneficial enjoyment, which the landlord is bound not only to abstain from molesting but to maintain. There is no duty resting upon the tenant to demand of the landlord restoration, and of consequence, there can be no necessity of a refusal to restore as an element of eviction." The court by Brickell, J. in Warren v. Wagner, 75 Ala. 188, on page 204.

<sup>38</sup> Humes v. Gardner, 49 N. Y. Supp. 147, 22 Misc. Rep. 333, 83 N. Y. St. Rep. 147.

do so without a judgment in foreclosure and threatens to oust the tenant of the mortgagor it is an eviction of such tenant which the tenant may plead against his landlord.<sup>39</sup> For an actual entry on the lands under a paramount title not under any judgment is an eviction. The tenant is not bound to resist if he is satisfied that resistance of the entry will be illegal and ineffectual. He may vacate at once as evicted if he does so in good faith and without collusion with the person who has entered.

**§ 692. An eviction by a paramount title.** The assertion of a paramount title by a third party as a result of which the tenant is ousted from possession is an eviction which the tenant may plead against his landlord. The deprivation of the possession and enjoyment of the premises for which the tenant has agreed to pay rent renders it inequitable to demand from him or to compel him to pay rent. The consideration having failed by reason of the weakness of his landlord's title he is not compelled to pay for what the landlord is unable to deliver to him.<sup>40</sup> So rent which is due after a total eviction of the premises by a stranger asserting paramount title, is discharged and no apportionment can be had.<sup>41</sup> The rule just stated is not inconsistent

<sup>39</sup> Smith v. Shepard, 15 Pick. (Mass.) 147, 149, 25 Am. Dec. 432.

<sup>40</sup> Ricketts v. Garrett, 11 Ala. 806; Wheelock v. Warshauer, 34 Cal. 265; Montanye v. Wallahan, 84 Ill. 355; Wells v. Mason, 5 Ill. 84; Gore v. Stevens, 1 Dana (Ky.) 201, 25 Am. Dec. 141; Smith v. Shepard, 15 Pick. (Mass.) 147, 149, 25 Am. Dec. 432; Morse v. Goddard, 13 Met. (Mass.) 177, 180, 46 Am. Dec. 728; George v. Putney, 4 Cush. (Mass.) 351, 50 Am. Dec. 788; Marsh v. Butterworth, 4 Mich. 575; Cornelissens v. Driscoll, 89 Mich. 34, 41, 50 N. W. Rep. 749; Russel v. Fabyan, 27 N. H. 529; Mason v. Lenderoth, 88 App. Div. 38, 84 N. Y. Supp. 740, 742; Home Life Insurance Co. v. Sherman, 46 N. Y. 370, 373; Conley v. Schiller, 24 N. Y. Supp. 473; Ross v. Dysart, 33 Pa. St. 452.

<sup>41</sup> *In re Arkell Publishing Co.*, 60 N. Y. Supp. 832, 29 Misc. Rep. 145. In Schwartz v. Locket, 61 Law Times, 719, it was held that the rule of the text did not apply to a tenancy from year to year as there was no implied covenant of quiet enjoyment. Hence where a tenant from year to year was evicted on the termination of the landlord's interest by the assertion of a paramount title by a superior landlord, he had no remedy against his lessor, but this is hardly within the rule as the tenant evicted was evidently a sub-tenant. Schwartz v. Locket, 61 L. T. 719, 38 W. R. 142; Penfold v. Abbott, 32 L. J., Q. B. 67, 9 Jur. (N. S.) 517, 7 L. T. 384, 11 W. R. 169.

with the rule that a tenant cannot deny the title of his landlord, or assert a title in a stranger. A well known exception to the rule permits the tenant to show that his landlord's title has terminated during the term, either by sale or by the assertion of a superior title in legal proceedings. In order that a tenant shall be entitled to claim that a judgment in ejectment against his landlord is an eviction he must abandon the premises. If he shall remain in possession after the judgment has been rendered, he is bound by his covenant to pay rent to his landlord, though the title has been determined to be in a stranger.<sup>42</sup> And with greater reason he cannot refuse to pay rent to his landlord solely because some one else claims the ownership of the premises, and has begun a suit in ejectment to establish his claim. The tenant may abandon the premises during or at the beginning of a suit in ejectment and rely upon an eviction as a defense to an action for the rent. To constitute an eviction by the assertion of a paramount title, a judgment establishing a title is not necessary. It is not necessary that the tenant shall be physically ousted to constitute an eviction. If a judgment in ejectment is recovered against the landlord, and a writ is issued entitling the plaintiff in ejectment to the premises, it is an eviction. Under such circumstances on a recovery of the premises by the landlord on a re-trial of an ejectment he can compel a tenant to pay rent to him for the period between the eviction and the restitution.<sup>43</sup> The tenant is not bound to continue in possession of the premises until the judgment in the action of eviction, and an actual physical expulsion by legal process. He need not submit himself to the trouble, inconvenience and expense of litigation to defend his landlord's title, but he may quietly yield possession to him who has or claims he has title paramount to that of the landlord. The tenant will then have, when he interposes the defense of an eviction, the burden of proving that there was subsequently an actual judgment under and by virtue of a paramount title that the tenant acted in good faith and that he was free from collusion with the party who entered under such judgment.<sup>44</sup> But it

<sup>42</sup> *Hochenauer v. Hilderbrandt*,  
6 Colo. App. 199, 40 Pac. Rep.  
470; *Eddy v. Coffin*, 149 Mass.  
463, 21 N. E. Rep. 870, 14 Am. St.  
Rep. 441.

<sup>43</sup> *Ross v. Dysart*, 33 Pa. St. 452.  
<sup>44</sup> *Montanye v. Wallahan*, 84 Ill.  
355; *Smith v. Shepard*, 15 Pick.  
(Mass.) 147, 180; *Duncklee v.  
Webber*, 151 Mass. 408, 24 N. E.

must be said in connection with what has just been stated that the mere institution of an action for ejectment or some other means to enforce a paramount title or even under a judgment in decree of such an action, sustaining an action is not necessarily an eviction if the tenant remains in possession. To constitute an eviction where it is based on a paramount title, there must be either an entry or an ouster of the tenant under or by virtue of the title, or if he is convinced of the hopelessness of his condition, he must surrender possession and justify his action in so doing as against his landlord.<sup>45</sup> When he learns that a judgment has been rendered in a court of law, he need not wait to be forcibly ousted, but may voluntarily acquiesce in the judgment and obey it.<sup>46</sup> An eviction of a tenant by a title paramount to the title of the landlord must necessarily be an end of the tenancy. Where the landlord appears in defense of his tenant and defends at his request he cannot in a subsequent action by him against the tenant claim there was no eviction. The judgment and proceedings in the ejectment by the third party are competent to prove an eviction and the fact that after the tenant had been ousted by the writ in ejectment the landlord appealed does not revive the tenancy or restore the parties to their original obligations. The appeal at the utmost only suspends proceedings under the judgment and nothing short of a reversal and restitution to possession will reinstate the term.<sup>47</sup> An eviction may be brought about by a proceeding in equity to establish a paramount title as

Rep. 1082; *Marsh v. Butterworth*, 4 Mich. 575; *Cornelisens v. Driscoll*, 89 Mich. 34, 41, 50 N. W. Rep. 749; *Moffat v. Strong*, 22 N. Y. Super. Ct. (Bosw.) 57; *Mattoon v. Munroe*, 21 Hun. (N. Y.) 74; *Dyett v. Pendleton*, 8 Cow. (N. Y.) 727; *Ross v. Dysart*, 33 Pa. St. 452, 453, 454. The taking of a lease from the holder of the paramount title under pressure of a writ of *habere facias possessionem* and without collusion is an eviction. Compare *Mason v. Lenderoth*, 88 App. Div. 38, 84 N. Y. Supp. 740, 742.

<sup>45</sup> *Pittsburgh C. & St. L. Ry. Co. v. Columbus C. & I. C. Ry. Co.*, 19 Fed. Cases 11, 197, 8 Biss. C. C. 456; *Lynch v. Sauer*, 37 N. Y. Supp. 666, 16 Misc. Rep. 1; *Dickson v. Hunt*, (Ohio) 13 Wkly. Law Bul. 13; *Ross v. Dysart*, 33 Pa. St. 452, 454; *Hayes v. Ferguson*, 15 Lea (Tenn.) 1, 9, 54 Am. Rep. 398; *Murray v. Pennington*, 3 Grat. (Va.) 91.

<sup>46</sup> *Home Life Ins. Co. v. Sherman*, 46 N. Y. 370, 373.

<sup>47</sup> *Wheelock v. Warshauer*, 34 Cal. 265, 269.

against the landlord to the same extent and in the same manner as an action in ejectment at common law. Thus, a suit by a mortgagee to foreclose the mortgagor's equity of redemption with a decree therein ordering a sale, would be an eviction from the moment of sale so far as the tenants of the mortgagor are concerned whose leases are subsequent to the date of the mortgage. And generally a decree in a court of equity establishing a paramount title in some person other than the lessor may operate as effectually to oust the tenant as a judgment and the execution of a writ of possession in a court of common law. Thus the appointment of a receiver by the court in an equity suit with an order directing tenants to vacate and deliver the premises to him, followed by the delivery of the premises is an eviction by the enforcement and assertion of a title paramount. The tenant may thereafter refuse to pay rent to the landlord. If the latter was not a party to the suit in which the receiver was appointed the tenant must show that he notified him to defend unless he can show that the landlord actually had knowledge of the suit. The tenant must show that the order was proper in case the landlord was not a party to the suit. In case the landlord was a party to the suit he is estopped to attack the validity of the order as against the tenant, unless he can show that it was made in collusion with the tenant.<sup>48</sup> A threat to prosecute the tenant for trespass by one to whom the lessor has sold the land during the absence of the tenant<sup>49</sup> or a threat to oust a lessee by a mortgagee who has entered into possession by virtue of an express provision in the mortgage<sup>50</sup> is not an eviction. A decree directing the sheriff to rent the demised premises which is rendered in an action between third persons and the lessor to which the lessee is not a party is not an eviction where the sheriff lets the premises to another and the tenant voluntarily surrenders. There must be a paramount title established in an action and an express direction to oust the tenant,<sup>51</sup> before an eviction takes place.

<sup>48</sup> Mariner v. Chamberlain, 21 Wis. 251, 255.

<sup>49</sup> Cornelissens v. Driscoll, 89 Mich. 34, 41, 50, N. W. Rep. 749.

<sup>50</sup> Smith v. Shepard, 15 Pick. (Mass.) 147, 149, 25 Am. Dec. 432.

<sup>51</sup> Murray v. Pennington, 3 Gratt (Va.) 91, 96, 97.

**§ 693. The leasing of the premises to a stranger.** An eviction is often said to take place where, during the term, the landlord without the consent of the tenant leases the premises to a third person and delivers possession to him and the new tenant, without the consent of the former tenant, enters upon the premises.<sup>52</sup> So if the landlord notifies the tenant that he has leased the premises to another person and, after such notice, the tenant surrenders the premises to the other it is an eviction.<sup>53</sup> This is the law though the tenant has previously abandoned the possession.<sup>53a</sup> So where a tenant makes an attempt to surrender the premises to the landlord by going out of possession and at the same time tendering the keys to the landlord which the latter refuses to accept but after some time has elapsed the landlord leased the premises to another person who entered therein it has been said that the act of the landlord was an eviction and might be so pleaded.<sup>54</sup>

**§ 694. An abandonment of the premises by the tenant.** It is unquestionably the general rule that there can be no constructive eviction of the tenant unless he shall abandon posses-

<sup>52</sup> Rice v. Dudley, 65 Ala. 68, 71; Graham v. Anderson, 3 Harr. (Del.) 364; Smith v. Wise, 58 Ill. 141, 144; Miller v Mitchell, 13 Ind. App. 190, 41 N. E. Rep. 467; Dolton v. Sickel, 66 N. J. Law 492, 49 Atl. Rep. 679; Hirschfield v. Franks, 112 Mich. 448, 70 N. W. Rep. 894.

<sup>53</sup> Starkweather v. Maginnis, 196 Ill. 274, 63 N. E. Rep. 692, affirming 98 Ill. App. 143.

<sup>53a</sup> Rice v. Dudley, 65 Ala. 68, 71.

<sup>54</sup> Hall v. Burgess, 5 B. & C. 332, 11 E. C. L. 246, 8 D. & R. 67. It is an abuse of the English language to call the entry of a landlord on the premises *after* the tenant has left them an eviction. It is merely an acceptance of a surrender of the term. An

entry by the lessor and his reletting to a new tenant on the bankruptcy of his lessee and the removal of his goods from the premises by his trustee is an eviction of the bankrupt which terminates the lease. The lessor is then estopped to assert that he has entered as the agent of the lessee, where the lease does not expressly give him a right to do so. *In re Mahler* 105 Fed. Rep. 428, 432; *Ex parte Houghton* 1 Law 554, 12 Fed. Cases 6725. But it has also been held that a surrender by the assignee in bankruptcy to the lessor the latter subsequently leasing the premises to others is neither a surrender or an eviction. *Stewart v. Sprague*, 71 Mich 50, 38 N. W. Rep. 673, 76 Mich. 184, 42 N. W. Rep. 1088.

sion of the premises within a reasonable time of the act complained of and solely on account of the acts and circumstances alleged to constitute an eviction. Where he remains in possession and pays rent, and even when he absolutely refuses to pay rent he is estopped to allege an eviction by the landlord's acts which may have disturbed his possession.<sup>55</sup> For it would be both unfair and illogical to permit the tenant to enjoy the benefits of the possession and at the same time escape paying rent by showing circumstances which would have justified him in surrendering possession.<sup>56</sup> The tenant must also show that his

<sup>55</sup> *Warren v. Wagner*, 75 Ala. 188; *Crommelin v. Thiess*, 31 Ala. 412, 70 Am. Dec. 499; *Eisenhart v. Ordean*, 3 Colo. App. 162, 32 Pac. Rep. 495, 497; *Barrett v. Boddie*, 158 Ill. 479, 42 N. E. Rep. 143, 144, 49 Am. St. Rep. 172; *Keating v. Springer*, 146 Ill. 481, 37 Am. St. Rep. 175; *Humphreville v. Billinger*, 62 Ill. App. 125; *Dennick v. Ekdahl*, 102 Ill. App. 199; *Kistler v. Wilson*, 77 Ill. App. 149; *Talbott v. English* 156 Ind. 299, 59 N. E. Rep. 857, 860; *Boston etc. R. Corp. v. Ripley*, 13 Allen (Mass.) 421; *DeWitt v. Pierson*, 112 Mass. 8; *Royce v. Guggenheim*, 106 Mass. 201, 8 Am. Rep. 322; *International Trust Co. v Schumann*, 158 Mass. 287, 33 N. E. R. 509; *Taylor v. Finnigan*, 189 Mass. 568, 76 N. E. Rep. 203; *Riley v. Lally*, 172 Mass. 244, 51 N. E. Rep. 1088. *Martin v. Martin*, 7 Ind. 368, 61 Am. Dee. 364; *Beecher v. Dufield*, 97 Mich. 423, 56 W. W. Rep. 777; *Witte v. Quinn*, 38 Mo. App. 681; *Scott v. Simons*, 54 N. H. 426; *Morris v. Kettle*, 57 N. J. Law 218, 30 Atl. Rep. 879; *Wyckoff v. Frommer*, 12 Misc. Rep. 149, 33 N. Y. Supp 11; *Cram v. Dresser*, 4 N. Y. Super. Ct. 120; *Edger-*ton v. Page, 20 N. Y. 281, 5 Abb. prac. (N. Y.) 1, 1 Hilt. 320; *Boreel v. Lawton*, 90 N. Y. 293, 43 Am. Rep. 170; *Copeland v. Luttgen*, 17 Misc. Rep. 605, 40 N. Y. Supp 653; *Silvermann v. Lurie*, 32 Misc. Rep. 734, 66 N. Y. Supp. 497; *Seaboard Realty Co. v. Fuller*, 67 N. Y. Supp 146, 147, 33 Misc. Rep. 109, 8 N. Y. Ann. Cases 418; *McKenzie v. Hatton*, 141 N. Y. 6, 35 N. E. Rep. 929, affirming 70 Hun, 142, 24 N. Y. Supp. 88; *Olson v. Schevlovitz*, 86 N. Y. Supp. 834, 836, 91 App. Div. 405; *Butler v. Carillo*, 88 N. Y. Supp. 941; *George A. Fuller Co. v. Manhattan Const. Co.*, 88 N. Y. Supp. 1049, 44 Misc. Rep. 219; *Horberg v. May*, 153 Pa. St. 216, 217, 25 Atl. Rep. 750; *Yates v. Bachley*, 33 Wis. 185, 188, 189; *Stokes v. Cooper*, 3 Camp. 513n; *Dunn v. Dinuovo*, 3 Man. & G. 105, 3 Scott (N. R.) 487, 10 L. J. C. P. 318.

<sup>56</sup> *Boreel v. Lawton*, 90 N. Y. 293, 43 Am. Rep. 176. "The proposition that there may be retention of demised premises and an eviction are logically and legally contradictory. The position has not the slightest warrant in law, principle, sense or decisions.

abandonment was wholly the outcome of the wrongful conduct of his landlord. If it shall appear that he voluntarily surrendered possession of the premises<sup>57</sup> as where he suggests to the landlord that he shall vacate the premises after they have been partially destroyed by fire in order that the landlord may enter and repair<sup>58</sup> it is not an eviction. So a tenant who after an eviction by the enforcement of a paramount title returns and occupies the premises after he has been ousted is estopped to recover damages for his eviction.<sup>59</sup> Where the tenant is evicted from a portion of the premises by the act of the landlord he is absolved from the payment of the whole rent as the lessor cannot apportion his own wrong. Neither the failure of the tenant to abandon that part of the premises from which he has not actually been ousted nor his voluntary payment of rent therefore will waive his right to claim an eviction. Nothing short of a new contract to pay rent for what he still occupies will have such an effect.<sup>60</sup>

**§ 695. The eviction of a tenant from a part of the premises.** Whether the eviction of a tenant from a part of the premises, shall or shall not suspend the payment of the rent for the whole, depends upon the circumstance whether it is brought about by the active agency of the landlord, or whether it is the result of the act of a stranger to the lease. In the latter case, the ouster or loss of possession by the tenant, cannot under the general rule be termed an eviction, and as the landlord is in no case responsible for it, he should not suffer thereby. So, also, generally where the partial eviction is caused by the assertion of

There are cases in which it has been deemed that there was an eviction without a forcible ouster. But in such cases the tenant abandoned, and the court held that acts of the landlord were so illegal and monstrous as to be equivalent to absolute physical ouster." Mortimer v. Brunner, 6 Bosw. (N. Y.) 653.

<sup>57</sup> Lettice v. Honnold, 63 Ill. 335.

<sup>58</sup> Ogden v. Sanderson, 3 E. D. Smith (N. Y.) 166.

<sup>59</sup> Martin v. Martin, 7 Md. 368,

61 Am. Dec. 364. The same rule would apply where the eviction consisted in the deprivation of the easement of access by the building of a fence by the lessor. Beecher v. Duffield, 97 Mich. 423, 56 N. W. Rep. 777.

<sup>60</sup> Morris v. Kettle, 57 N. J. Law 218, 30 Atl. Rep. 879, 880. See also as to the effect of the tenant demanding rent of the landlord, Drucker v. Simon, 4 Daly (N. Y.) 53.

a title paramount, the whole rent is not suspended for the reason that the eviction is not the result of any wrongful act on the part of the landlord. Thus, as a general rule, the eviction of a tenant under a title paramount from a part only of the premises, does not suspend the running of rent where the tenant continues in possession of the remainder of the premises, and uses and enjoys it as before the eviction. The tenant cannot thereafter be sued on the covenant to pay rent as that implies his possession of the whole premises, but he still continues liable thereafter to his landlord and may be sued in an action for use and occupation for the payment of such rent as the part he continues to occupy bears to the whole premises.<sup>61</sup> The condemnation and appropriation of a part of the leased premises for a public use are a good defense in an action on the covenant to pay rent for the whole and the tenant is entitled to a proportionate abatement of the rent.<sup>62</sup> A tenant who voluntarily surrenders the possession of his premises to a railroad company for its purposes upon the service of the notice required to be served

<sup>61</sup> Collins v. Karatopsky, 36 Ark. 316; Halligan v. Wade, 21 Ill. 470, 74 Am. Dec. 108; Calhoun v. Atchison, 4 Bush. (Ky.) 261, 96 Am. Dec. 299; Pontalba v. Domingon, 11 La. 192; Fillebrown v. Hoar, 124 Mass. 580, 583; Fitchburg Cotton Co. v. Melven, 15 Mass. 268; Mc Fadin v. Rippey, 8 Mo. 738; Blair v. Claxton, 18 N. Y. 529; Johnson v. Oppenheim, 43 How. Pr. (N. Y.) 433, 438, 12 Abb. Prac. (N. S.) 449; Moffat v. Strong, 22 N. Y. Super. Ct. 57; Hegeman v. McArthur, 1 E. D. Smith (N. Y.) 147; Carter v. Burr, 39 Barb. (N. Y.) 59, 67; Poston v. Jones, 37 N. Car. 350, 38 Am. Dec. 683; Crown Mfg. Co. v. Gay, 9 Ohio Dec. 240, 13 W. L. Bul. 188; Seabrook v. Moyer, 88 Pa. St. 417; Tunis v. Granby, 22 Gratt (Va.) 109; Doe v. Meyler, 2 Maule & D. 276; Smith v. Ra-

leigh, 3 Camp. 513, 14 R. R. 829; Newton v. Allin, 1 G. & D. 44 1 Q. B. 518, 10 L. J. Q. B. 179, 6 Jur. 99; Burn v. Phelps, 1 Stark 94, 18 R. R. 749; Holgate v. Kay, 1 Car. & K. 341; Stevenson v. Lambard, 2 East 575; Neale v. McKenzie, 1 M. & W. 747; Tomlinson v. Day, 2 Brod. & Bing. 680.

<sup>62</sup> Leiter v. Pike, 127 Ill. 287; 20 N. E. Rep. 23; David v. Beelman, 5 La. Ann. 545; Kingsland v. Clark, 24 Mo. 24, Gillespie v. Thomas, 15 Wend. (N. Y.) 464. The condemnation of a portion of a plot leased for a term of years will extinguish a proportionate part of the rent and entitle the landlord and tenant to compensation agreeable to their respective rights. Biddle v. Hussman, 23 Mo. 597, 23 Mo. 602; Kingsland v. Clark, 24 Mo. 24.

by statute but without being compensated for his interest which he was entitled to by the statute continues liable for rent to the end of the year or other rental period.<sup>63</sup> But an eviction by the landlord from a part of the premises does not necessarily put an end to the tenancy nor is the tenant thereby discharged from the performance of any of his covenants other than the covenant to pay rent.<sup>64</sup> The rule is if the lessee is evicted from a part of the land demised by a stranger asserting a paramount title the rent will be suspended *pro tanto* and will be apportioned and payable only as to the residue from which the lessee has not been evicted. This rule is applicable where the lessor has been evicted before the term is to begin and the lessee cannot enter on a part of the premises because of the enforcement of a title paramount to that of his lessor. The tenant may interpose this as a counter-claim in an action at law on the covenant to pay rent or, where he cannot do this at law because an action is brought against him on a bond or other independent instrument to secure the rent he may have relief in equity,<sup>65</sup> by an injunction to restrain the prosecution of the action at law. Where, however, the eviction is wholly the result of some act on the part of the landlord, the entire rent is suspended, though the dispossession is partial for the reason that a man cannot be permitted to apportion his illegal or tortious act. The landlord who enters upon one portion of the premises cannot therefore compel his tenant to pay rent for another portion of the premises upon which he does not

<sup>63</sup> Wainwright v. Ramsden, 5 Mee. & Wel. 602, 1 Railw. Cas. 714, 9 L. J. Eq. 120.

<sup>64</sup> Morrison v. Chadwick, 7 C. B. 266, 6 D. & L. 567, 18 L. J. C. R. 189. Though an eviction of the tenant from a part of the demised premises creates a suspension of the entire rent during the continuance of the eviction, the tenancy is not thereby terminated for all purposes nor is the tenant discharged from the performance of any of his covenants other than the covenant for the payment of the rent. Hence in an action of assumpsit by the landlord

for a breach of a promise by the tenant to use the premises in a proper and tenantlike manner a plea that before any breach of covenant by the tenant the landlord entered and evicted the tenant from the premises, and that he thereupon abandoned and gave up possession of the same is bad inasmuch as the plea does not show any dissolution of the relation of landlord and tenant. Morrison v. Chadwick, 7 Com. Bench. 266.

<sup>65</sup> Poston v. Jones, 2 Ired. (N. C.) Eq. 350, 351

enter.<sup>66</sup> The tenant is universally by implication entitled to the whole of the premises which he has hired and if the loss of the use of any material part thereof renders the remainder of less advantage to him which is usually the case, he may abandon the whole premises and claim an eviction.<sup>67</sup> The landlord cannot collect any rent though the tenant shall remain in possession of that part of the premises from which he has not actually been ousted until the end of the term.<sup>68</sup> For the tenant is not com-

<sup>66</sup> *Crommelin v. Thiess*, 31 Ala. 412; *Warren v. Wagner*, 75 Ala. 188, 202, 51 Am. Rep. 446; *Anderson v. Winton*, 137 Ala. 422, 34 So. Rep. 962; *Collins v. Karatopsky*, 36 Ark. 316; *Okie v. Person*, 23 App. D. C. 170; *Wade v. Halligan*, 16 Ill. 507; *Halligan v. Wade*, 21 Ill. 470, 74 Am. Dec. 108; *Smith v. Wise*, 58 Ill. 141; *Hayner v. Smith*, 63 Ill. 430; *Miller v. Michel*, 13 Ind. App. 190, 41 N. E. Rep. 467, 468; *Avery v. Dougherty*, 102 Ind. 443, 52 Am. Rep. 680, 2 N. E. Rep. 123, 126; *Talbott v. English*, 156 Ind. 299, 305, 59 N. E. Rep. 857; *Skally v. Shute*, 132 Mass. 367, 372; *Royce v. Guggenheim*, 106 Mass. 201, 202, 8 Am. Rep. 322; *Colburn v. Morrill*, 117 Mass. 262, 264, 19 Am. Rep. 415; *Shumway v. Collins*, 6 Gray (Mass.) 227; *Leischman v. White*, 1 Allen (Mass.) 489; *Witte v. Quinn*, 38 Mo. App. 681, 691; *Hunter v. Reiley*, 43 N. J. Law, 480, 482; *Morris v. Kettle*, 57 N. J. Law, 218, 30 Atl. Rep. 879; *Dolton v. State*, 66 N. J. Law, 492, 49 Atl. Rep. 679; *Lewis v. Payn*, 4 Wend. (N. Y.) 423; *Buffalo Stone & Cement Co. v. Radsky*, 14 N. Y. St. Rep. 82; *Christopher v. Austin*, 11 N. Y. 216; *Perniciaro v. Veniero*, 90 N. Y. Supp. 369; *Pendleton v. Dyett*, 4 Cow. (N. Y.)

581; *Vermilya v. Austin*, 2 E. D. Smith (N. Y.) 302; *Peck v. Hiler*, 14 How. Pr. (N. Y.) 155; *Brown v. Wakeman*, 16 N. Y. Supp. 846; *Crown Mfg. Co. v. Gay*, 9 Ohio, Dec. 420, 13 W. Law Bul. 188; *Vaughan v. Blanchard*, 1 Yeates (Pa.) 175, 176; *Wolf v. Weiner*, 2 Brewst (Pa.) 524; *Briggs v. Hall*, 4 Leigh (Va.) 484, 487; *Tunis v. Grandy*, 22 Grat. (Va.) 100; *Smith v. Raleigh*, 3 Camp. 513; *Salmon v. Smith*, 1 Saund. 204, n. 2; *Morrison v. Chadwick*, 7 C. B. 266, 268, 283; *Upton v. Townend*, 17 C. B. 30; *Neale v. Mackenzie*, 1 M. & W. 747; *Hodgkins v. Robson*, 1 Vent. 276, 277.

<sup>67</sup> The leasing of the premises and the entry of the new tenant upon a part thereof, *Miller v. Michel*, 13 Ind. App. 190, 41 N. E. Rep. 467, 468; or the reletting of a part of the premises, *Dolton v. State*, 66 N. J. Law 492, 49 Atl. Rep. 679; *Morris v. Kettle*, 57 N. J. Law 218, 30 Atl. Rep. 879, 880, may be an eviction.

<sup>68</sup> *Hayner v. Smith*, 63 Ill. 430, 14 Am. Rep. 124; *Campbell v. Shields*, 11 How. Pr. (N. Y.) 565; *Edmison v. Lowry*, 3 S. D. 77, 55 N. W. Rep. 583, 17 L. R. A. 275, 44 Am. St. Rep. 774; Compare, *Anderson v. Chicago Marine & Fire Ins. Co.*, 21 Ill. 601.

elled to abandon the whole premises and may treat an eviction as partial, remaining in possession of that portion of the premises which he has been permitted to occupy undisturbed, and recover his damages for being deprived of the balance.<sup>69</sup> A tenant who is evicted from a part of the demised premises does not, by demanding from his landlord a sum of money as rent for the portion of the premises from which he has been evicted, waive his right of action to recover damages for the partial eviction. To enable the jury the better to determine the damages for a partial eviction it must appear what were the situation, convenience and equality of accommodation of the premises from which the tenant has been removed, as compared with the whole of the de-

<sup>69</sup> Herpolheimer v. Funke, 1 Neb. (Unof.) 471, 95 N. W. Rep. 688. "Where a lessor takes a lease of part of the land or enters wrongfully into part, there are variety of opinions whether the entire rent shall not be suspended, during the continuance of such lease or tortious entry; and in the last case it seems to be the better opinion and the settled law at this day that the tenant is discharged from the payment of the whole rent, till he be restored to the whole possession, that no man may be encouraged to injure or disturb his tenant in his possession, whom by the policy of the feudal law he is bound to protect." 6 Bac. Abr. Rent, M. p. 49. "If a man lease a rectory, for years, reserving rent, and upon part of the glebe there is a sheep cot, and the lessor enter and pull it down, and the lessee re-rent, and then the rent is in arrear; the rent is suspended, notwithstanding the re-entry of the lessee for part of the profits of the thing leased is taken from the lessee to wit, his house and that by the act of the lessor." Roll's Abr. 940.

In New York the rule with reference to the interference by landlords with tenants are. 1. Where the tenant is evicted without the wilful or voluntary agency the landlord, from the whole or some part of the demised premises if the eviction is from the whole premises, the tenant is not chargeable with rent; but if it is from part of the premises the law requires the rent to be apportioned so that the tenant shall be liable to pay for such portions of the premises as he retains. 2. Where the landlord commits acts of trespass which interfere more or less with the beneficial enjoyment of the premises, but which leave the demised premises intact, and do not deprive the tenant of any part of them so that, though he may be injured, he is not dispossessed, the rule is, inasmuch as the wrongful act of the landlord stops short of depriving the tenant of any portion of the premises, the act is merely a trespass and affords no defense to an action for rent. Home etc. Insurance Co. v. Sherman, 46 N. Y. 370.

mised premises, and, in a case where the eviction was neither forcible nor sudden, that the tenant had made diligent efforts to secure other premises at the same rent and had failed to do so.<sup>70</sup>

**§ 696. The demand and refusal of restoration to possession.** A tenant who has been evicted is not bound to demand of his landlord that he shall be restored to the possession. Hence the landlord's refusal to restore the possession is not a necessary element of an eviction though provable as indicating the intention of the landlord.<sup>71</sup> The locking up of the premises by an officer levying an attachment at the suit of the landlord the rent is not an eviction where the tenant permitted his property to remain in the premises without any demand for its surrender.<sup>72</sup>

**§ 697. The effect of an eviction.** The liability of a tenant who has covenanted to pay rent, does not necessarily depend upon his possession. Thus, he may be liable for rent which he has expressly agreed to pay, though he has never gone in possession. There is an exception to this rule, however, where the tenant is deprived of his possession by the act of the landlord. An eviction of the tenant by the landlord relieves him from the payment of all rent which accrues subsequently during the term.<sup>73</sup>

<sup>70</sup> Drucker v. Simon, 4 Daly (N. Y.) 53.

<sup>71</sup> Warren v. Wagner, 75 Ala. 188, 51 Am. Rep. 446.

<sup>72</sup> Daniels v. Logan, 47 Iowa 395.

<sup>73</sup> Landt v. McCullough, 121 Ill. App. 328; Field v. Herrick, 10 Ill. App. 591; Halligan v. Wade, 21 Ill. App. 470, 74 Am. Dec. 108; Wright v. Lattin, 38 Ill. 293; Montanye v. Wallahan, 84 Ill. 355; Leadbeater v. Roth, 25 Ill. 587; Jennings v. Bond, 14 Ind. App. 282, 42 N. E. Rep. 957; Orleans Theater Ins. Co. v. Lafferandiere, 12 Rob. (La.) 472; Fitchburg Cotton Manufacturing Corp. v. Melven, 15 Mass. 268, 270; Smith v. Shepard, 15 Pick. (Mass.) 147, 149, 25 Am. Dec. 432; Morse v. Goddard, 13 Met. (Mass.) 177, 46

Am. Dec. 728; Marsh v. Butterworth, 4 Mich. 575, 577; Day v. Watson, 8 Mich. 535, 536; Pridgeon v. Excelsior Boat Club, 66 Mich. 326, 33 N. W. Rep. 502; Witte v. Quinn, 38 Mo. App. 681, 690; Jackson v. Eddy, 12 Mo. 209; Hegeman v. McArthur, 1 E. D. Smith (N. Y.) 147; Buffalo Stone & Cement Co. v. Radsky, 14 N. Y. St. Rep. 82; Frommer v. Roessler, 12 Misc. Rep. 152, 33 N. Y. Supp. 13; Pendleton v. Dyett, 4 Cow. (N. Y.) 581; Cohen v. Dupont, 3 N. Y. Super. Ct. 260, 264; Johnson v. Oppenheim, 12 Abb. Pr. (N. S.) 449, 43 How. Pr. (N. Y.) 433; Hall v. Gould, 13 N. Y. 127; Chaterton v. Fox, 12 N. Y. Super. Ct. (Duer.) 64; Edgerton v. Page, 12 How. Pr. (N. Y.) 58; Bradley v.

The eviction puts an end to the lease but has no effect on the rights of either party which have accrued. The eviction of a tenant is no defense in an action brought by his landlord to recover rent which has accrued prior thereto.<sup>74</sup> If the rent is payable in installments an eviction is no defense to an installment which became due before the eviction though it is a good defense to all installments which become due thereafter.<sup>75</sup> Where rent which is payable in advance has been paid before the eviction the tenant may recover so much of it as covers the period during which he has been deprived of the possession as an element of his damages. Rent which is payable in advance may be paid at any hour in the day upon which it is made payable and in case the tenant is evicted on that day he is discharged from his obligation to pay rent.<sup>76</sup> By an eviction the lease is at an

De Goicouria, 12 Daly 393, 67 How. Pr. (N. Y.) 76; Poston v. Jones, 2 Ired. (N. C.) Eq. 350, 351; Crown Mfg. Co. v. Gay, 13 Wkly. Law Bul. (Ohio) 188; Magaw v. Lambert, 3 Pa. St. 444, 445; Tiley v. Moyers, 43 Pa. St. 404, 410; Bennet v. Bittle, 4 Rawle (Pa.) 339; Mariner v. Chamberlain, 21 Wis. 251.

<sup>74</sup> Fitchburg Cotton Mfg. Co. v. Melven, 15 Mass. 268, 270; O'Brien v. Smith, 59 Hun. 624, 13 N. Y. Supp. 408, 409 affirmed in 129 N. Y. 620, 29 N. E. Rep. 1029; Johnson v. Barg, 8 Misc. Rep. 307, 28 N. Y. Supp. 728, Stevens v. Raab, 9 Mo. App. 573; Heine v. Morrison, 13 Mo. App. 590. Kessler v. McConachy, 1 Rawle (Pa.) 435; Tiley v. Moyers, 43 Pa. St. 404, 410; Pepper v. Rowley, 73 Ill. 262; Giles v. Comstock, 4 N. Y. 270, 274, 275, 53 Am. Dec. 374; La Farge v. Halsey, 14 N. Y. Super. Ct. 171, 4 Abb. Prac. (N. Y.) 297; Henning v. Savage, 100 N. Y. Supp. 1015; Briggs v. Thompson, 9 Pa. St. 338.

<sup>75</sup> Pepper v. Rowley, 73 Ill. 262.

<sup>76</sup> Smith v. Shepard, 15 Pick. (Mass.) 157, 150, 25 Am. Dec. 432, in which it is said where the prospective enjoyment of the land is taken away the obligation to make the prospective payment ceases, Giles v. Comstock, 4 N. Y. 270, 274, 275, 53 Am. Dec. 374. "Eviction, such as will suspend rent, is more than a mere trespass by the lessor, or a breach, in any other form, of the implied covenant for quiet enjoyment; it is an actual expulsion of the lessee out of all or some part of the demised premises. Rent is an equivalent or consideration of a demise, and it is impossible that the rent should last longer than the demise. It is the plain dictate of common sense that a lessor shall not exact his rent while he holds the tenant out of possession. But this is suspension, not forfeiture. His right to rent is restored by restoring the tenant to the possession and rent already accrued, and overdue, is not forfeited by

end for all purposes. The landlord cannot enforce a breach of any covenant which occurs after the eviction. Thus a tenant who has expressly covenanted to repair cannot be held liable in damages for a breach of his covenant occurring after the eviction. So, too, the sureties of the tenant who are obligated to pay rent in case he shall fail to do so cannot be held for rent accruing after an eviction has taken place.<sup>77</sup>

**§ 698. The measure of damages for an eviction.** The tenant may by way of recoupment or counterclaim recover damages from his landlord caused by the interference on the part of the latter with the tenant's enjoyment of the premises. This he may do in an action brought by the landlord to recover the rent. Where there has been an actual eviction there is no necessity for the doctrine of recoupment or counterclaim as the eviction affords a complete defense to the claim for rent. But where there has been an eviction falling short of this, that is, where the eviction is constructive merely arising from the landlord's interference with the tenant's quiet and beneficial enjoyment and possession of the premises this remedy is available to the tenant who has been injured. So also in the case of an actual eviction resulting in the abandonment of the premises by the tenant he may recover damages for the landlord's breach of the implied covenant of quiet enjoyment. The measure of the tenant's damages in the case of an eviction is the value of the unexpired term less the rent which would have been paid by him.<sup>78</sup> The tenant may also recover any other actual damages

the eviction. If sued for such rent the tenant may defalk the damages which the eviction caused, but the landlord's title to rent and his consequent right to sue therefore, are unimpaired by the eviction. He, cannot, however apportion rent. If a landlord might evict his tenant from part of the demised premises, and hold him for an apportioned rent of the residue, this would be a substitution of his arbitrary will for the mutual agreement which a lease is. The law apportions rent in

some cases, but does not allow a lessor to apportion it by means of a partial eviction." By Woodward, J. in *Tiley v. Moyers*, 43 Pa. St. 404 on p. 410.

"*Smith v. Thurston*, 10 Mo. App. 48.

<sup>78</sup> *Mc Elvaney v. Smith*, 76 Ark. 468, 88 S. W. Rep. 981; *Shuman v. Smith*, 100 Ga. 415, 28 S. E. Rep. 448; *Cannon v. Wilbur*, 30 Neb. 777, 47 N. W. Rep. 85; *Mack v. Patchin*, 42 N. Y. 167; *Huest v. Marx*, 67 Mo. App. 418; *Loyd v. Capps*, (Tex.) 29 S. W. Rep. 505;

which he has sustained and which are not too remote or speculative in their character. In case the lessee conducted an established business upon the premises the value of the good will of his business and the loss of profits occasioned by the eviction, if ascertainable with a reasonable degree of certainty, may be considered by the jury in estimating damages, and he may recover for them so far as the loss is proved.<sup>79</sup> A tenant who has been evicted from a barn which was destroyed by his landlord and which the tenant had used as a livery and boarding stable, may recover, as damages for the balance of the term, the loss of profits for boarding the horses of other persons, as well as for the difference in the cost of keeping his own horses, and having them boarded where the evidence tends to show that such damages were the natural and proximate consequence of the destruction of the barn.<sup>80</sup> So, it is proper to permit the tenant to prove the net income of his business before he was evicted as a guide for the jury, where he is suing not only for compensation but also for punitive damages in a case where the eviction was accomplished by force and without the knowledge of the tenant.<sup>81</sup> And if he is suing for prospective profits the exact sum of which is not ascertainable, he may testify from memory what his profits were before and what they have been since the eviction.<sup>82</sup> The expense occasioned to the tenant in moving, and the value of his time lost, may be recovered as damages in an action for damages

Utah Optical Co. v. Keith, 18 Utah, 464, 56 Pac. Rep. 155; Richardson v. Callahan, 73 Miss. 4, 19 So. Rep. 95; Amsden v. Atwood, 69 Vt. 527, 38 Atl. Rep. 263; Taylor v. Cooper, 104 Mich. 72, 62 N. W. Rep. 957. Compare, Mallett v. Hillyard, (Ga. 1903) 43 S. E. Rep. 779.

<sup>79</sup> Dwyer v. Carroll, 86 Cal. 298, 24 Pac. Rep. 1015; Bass v. West, 110 Ga. 698, 36 S. E. Rep. 244; Murphy v. Century Bldg. Co., 90 Mo. App. 621; Irwin v. Nolde, 164 Pa. St. 205, 30 Atl. Rep. 246, see Karbach v. Fogel, 63 Neb. 601, 88 N. W. Rep. 659; Porter v. Johnson, 96 Ga. 145, 23 S. E. Rep. 123.

<sup>80</sup> Shaw v. Hoffman, 25 Mich. 162.

<sup>81</sup> The loss of business and of its profits must be specifically pleaded. Dwyer v. Carroll, 86 Cal. 298; Dexter v. Manly, 4 Cush. (Mass.) 14; Lambert v. Huskell, 80 Cal. 611, 22 Pac. Rep. 327. For a case in which the lessee was entitled to recover for his prospective profits, see Snow v. Pulitzer, 142 N. Y. 263, 36 N. E. Rep. 1059; Goldersleeve v. Overstolz, 90 Mo. App. 518.

<sup>82</sup> Meyers v. Sea Beach Ry. Co., 167 N. Y. 581, 60 N. E. Rep. 1117, affirming 60 N. Y. Supp. 284, 43 App. Div. 573.

for a constructive eviction.<sup>83</sup> If a tenant has erected buildings upon the premises with the title therein reserved to himself, he can recover their value, if they are destroyed by the landlord in the process of evicting him.<sup>84</sup> A tenant who has been evicted from his premises by title paramount may recover, as a part of his damages, the reasonable expenses of removing a building which he had erected upon the premises during the term, and which he was compelled to remove by reason of the eviction, and the rent of a lot similarly situated upon which to place the building during the remainder of the term.<sup>85</sup> The same rule as to including the damages caused applies to the crops of the tenant destroyed by the landlord or the value of which is actually depreciated by the eviction.<sup>86</sup> The tenant cannot recover punitive or exemplary damages for an eviction unless he can prove that the landlord acted in bad faith, or maliciously, or without a reasonable belief that he had a good cause of action where the eviction is the result of legal proceedings. Where the landlord appears to have acted without malice and in good faith he is only liable to pay the actual damages caused by the eviction.<sup>87</sup> The damages given by the law for an eviction are compensation for

<sup>83</sup> Wade v. Herndl, 127 Wis. 544, 107 N. W. Rep. 4.

<sup>84</sup> Myers v. Sea Beach. Ry. Co., 167 N. Y. 581, 60 N. E. Rep. 1117; affirming 60 N. Y. Supp. 284, 43 App. Div. 573. See, also, De Donato v. Morrison, 160 Mo. 581, 61 S. W. Rep. 641.

<sup>85</sup> Wilson v. Raybould, 56 Ill. 417.

<sup>86</sup> Wilkinson v. Stanley (Tex. Civ. App.), 43 S. W. Rep. 606. The tenant however cannot recover the value of the crops as they are matured and gathered but only their value as growing. If the landlord, after preventing the tenant by an eviction from gathering the crops, reaps them when mature he is not entitled to set off against the tenant the time and money he has thus expended. Jefcoat v. Gunter, 73 Miss. 14, 19

So. Rep. 94. The tenant cannot recover in an action for damages on an eviction for his labor in cultivating land where he recovers the value of the term for his labor put upon the land to make it valuable to him is a part of the value of the term. Cornelissens v. Driscoll, 89 Mich. 34, 50 N. W. Rep. 749.

<sup>87</sup> Lelter v. Day, 35 Ill. App. 248; Harris v. Cleghorn, 121 Ga. 314, 48 S. E. Rep. 959. To enable the tenant to recover exemplary or punitive damages for an eviction he must show that the eviction was wanton, unlawful or malicious, Wamganz v. Wolff, 86 Mo. App. 205. It is error to instruct the jury that they may give punitive damages without an instruction on the good or bad faith of the landlord. Baumier v. An-

the breach of a contract express or implied *i. e.* the landlord's covenant of quiet enjoyment. There is no element of tort in the action. But if the owner sues out a legal and proper disposessory warrant, which is, after the tenant's default, properly and legally executed so that he is evicted, the tenant cannot, where he is simply holding over without the consent of the landlord and no contractual relations exist between the parties, maintain an action for the wrongful use of process unless he shall allege and prove the warrant was obtained with malice and without probable cause. In an action for eviction which is in theory based on a breach of contract malice and want of probable cause need neither be alleged nor proved. If it appears that a disposessory process has been instituted for some other object than it was designed by law to effect, the want of probable cause need not be proved. In all other cases where abuse of process is claimed malice and want of probable cause must be alleged and proved.<sup>88</sup> The parties to a lease may agree on a sum as liquidated damages to be inserted in the instrument. But a promise by a lessor to pay for buildings on the premises in case he should decide to remove therein a sum specified is not a covenant to pay liquidated damages in case of an eviction and merely confers on the lessor the right to terminate the lease on making such payment.<sup>89</sup>

**§ 699. Limitation on an action for an eviction.** The statute of limitations begins to run in the case of an action for the breach of a covenant of quiet enjoyment from the date of the eviction. The eviction as an infringement of a right, inflicts an immediate injury. The lessee need not wait until the expiration of his term to ascertain his damages but can abandon the premises and sue at once. This is the case where the eviction is complete and final but a different rule applies to partial evictions and to a continuous breach of a covenant running with the land.<sup>90</sup>

tian, 65 Mich. 31, 31 N. W. Rep. 888. Under a statute allowing treble damages to a tenant for an eviction it is proper for the jurors to fix the actual damages leaving it to be trebled by the court in a proper case. *Hong Sing v. Wolf*

Fein, 33 Misc. Rep. 608, 67 N. Y. Sup. 1109.

<sup>88</sup> *Porter v. Johnson*, 96 Ga. 145, 23 S. E. Rep. 123.

<sup>89</sup> *Harrison v. Jordan*, 194 Mass. 496, 80 N. E. Rep. 604.

<sup>90</sup> *Tube v. Montgomery*, 7 Tex. Civ. App. 557, 27 S. W. Rep. 19.

§ 700. **Equitable jurisdiction to restrain an eviction.** As a broad general proposition it may safely be said that equity will not usually interfere by an injunction or other process to enjoin the landlord from evicting the tenant. An injunction will not be entertained to enforce the right of the tenant to possession under the lease unless he would be otherwise irreparably damaged.<sup>91</sup> This rule is the outcome of the fact that a tenant who is evicted, has a clear and adequate legal remedy either in an action for damages for the eviction, or by a refusal to pay rent. Thus, as a general rule an action of ejectment or a similar proceedings brought by the landlord against the tenant to gain the possession of the premises will not be enjoined.<sup>92</sup> But if in the action of the landlord to recover possession it appears that there is some defense to the claim of possession which the tenant cannot legally interpose in the action for possession, an injunction may be issued to restrain a prosecution of the action. Thus, where a landlord refuses to grant a renewal on a valuation as by the lease he is bound to do, and in bad faith endeavors to prevent an appraisal and brings ejectment against the tenant as he is entitled to do at law in spite of his executed covenant, the lessee may enjoin his action of ejectment on the ground of fraud, though he has an action at law for damages on the covenant.<sup>93</sup> So where the landlord is bound at the end of the lease to pay for the tenant's fixtures, he will be enjoined from evicting the tenant until he has paid for the fixtures. And where a married woman has by her husband acting as her agent and with her ratification assigned a lease to one who relying upon her conduct, has parted with his money, she will be enjoined from evicting him from the premises by a suit of ejectment.<sup>94</sup> In all these cases it will be noted that there was some element of fraud or bad faith present in the conduct of the landlord which justified the interference of equity, and generally unless there is some

<sup>91</sup> *Goldman v. Corn.*, 97 N. Y. (Pa.) 97; *Lowenstien v. Keller*, 3 Supp. 926.

<sup>92</sup> *Kulp*, (Pa.) 361.

<sup>92</sup> *Beckham v. Newton*, 21 Ga. 187; *McLean v. Carroll*, 6 Rob. (La.) 43; *Warne v. Wagenor*, (N. J. 1888) 15 Atl. Rep. 1507; *Bean v. Pettengill*, 7 Rob. (N. Y.) 7; *Appeal of Goddard*, 1 Walker

<sup>93</sup> *Tscheider v. Biddle*, 8 Fed. Cas. 4210, 4 Dill. 58.

<sup>93a</sup> *Haynes v. Union Inv. Co.*, 30 Neb. 766, 53 N. W. Rep. 979.

<sup>94</sup> *Farrington v. Forman* (N. J.), 26 Atl. Rep. 532.

equitable defense in the action of ejectment, an injunction will not be granted. The mere fact that the tenant will lose the use of the premises is not alone sufficient. He can be compensated in damages for his loss in an action at law. But where it is apparent that the damages sustained by a tenant through an eviction cannot be compensated in law, equity will grant an injunction to protect his rights. This would be the rule where by the voluntary action of the landlord, a tenant was constructively or actually evicted under circumstance of great aggravation, as, for example, where the eviction was brought about by actually and literally tearing the premises down during the term and while the tenant was actually in possession of and enjoying the whole of them. For where the eviction is constructive, it does not seem always necessary that the tenant shall abandon the premises, and a tenant clearly has the right to insist upon remaining in the possession of the premises during the continuance of his term. If he chose to remain and suffer annoyance and inconvenience to the extent of being wholly deprived of the use and benefit of his premises, the landlord cannot plead in defense that the tenant did not surrender possession. It is not material whether or not his determination to remain is the result of caprice on his part. The tenant may have some individual and particular reason for remaining in the premises, and the court cannot inquire into this. Nor on the other hand should the landlord be permitted because he is under a peculiar and urgent necessity to obtain possession of the premises to employ means which though they do not act as an actual ouster are well calculated to deprive the tenant of his beneficial use and enjoyment of the premises.<sup>95</sup>

**§ 701. The right of the landlord to a bill of particulars.** A tenant who as a defense to a claim for rent pleads an eviction may in the discretion of the court be required to give a bill of particulars. This discretion, though usually exercised with con-

<sup>95</sup> *Proskey v. Cumberland Realty Co.*, 70 N. Y. Supp. 1125, 35 Misc. Rep. 50, where an apartment house was sold to one who with notice of the tenant's rights began to tear it down. The fact that the purchaser meant to erect a new

and expensive building will not permit him to interfere with the tenant's lawful possession. Nor will the fact that he will lose a large sum if enjoined remit the tenant to his remedy at law.

siderable liberality, ought to be kept within reasonable limits and not exercised so as to impose unnecessary burdens or inconvenience upon the tenant. The proper office of the bill of particulars is to prevent surprise upon the trial and to enable the parties to meet the evidence which is to be produced against them and to prepare their own evidence. It cannot be required of either party to furnish in his bill of particulars the facts and circumstances which are to constitute his proof upon the trial. Thus the tenant will be required to state in his bill of particulars where he alleges loss of profits by an eviction between what dates he suffered the loss he claims and the aggregate amount thereof.<sup>96</sup>

**§ 702. The landlord's failure to deliver possession.** The lessee is entitled to the full and complete possession of the demised premises from the beginning of his term. The landlord cannot hold him for the rent where he gives him only a partial or an interrupted possession. If the landlord fails to give or to tender possession or if without fault on the part of the tenant the premises are not in a fit condition for his entry it is the same as though he were evicted. He may abandon the lease and he cannot thereafter be held for the rent on his covenant to pay rent.<sup>97</sup> The fact that the lessor is prevented from performing his agreement to deliver possession by the act of God, inevitable casualty or by circumstances over which he has no control is no excuse for his failure to perform.<sup>98</sup> Thus where premises

<sup>96</sup> Hall v. Gerken, 96 App. Div. 632, 89 N. Y. Supp. 171. An order for a bill of particulars stating dates and what amounts of profits the tenant lost on each date, names of customers lost and in what particulars the value of the term was diminished was held too broad in this case.

<sup>97</sup> Dengler v. Michelson (Cal. 1888), 18 Pac. Rep. 138; Reed v. Reynolds, 37 Conn. 469, 474; Garner v. Byard, 23 Ga. 289, 68 Am. Dec. 527; Spencer v. Burton, 5 Blackf. (Ind.) 57; Hickman v. Rayl, 55 Ind. 551, 557; Kean v. Kolkschneider, 21 Mo. App. 538;

Corn v. Rosenthal, 1 Misc. Rep. 168, 20 N. Y. Sup. 632; O'Brien v. Smith, 59 Hun. 624, 13 N. Y. Supp. 408; Rothman v. Kosower, 48 Misc. Rep. 538, 96 N. Y. Supp. 268. It is not material whether the lessor refuses or is unable to deliver the possession, Wood v. Hubbell, 5 Barb. (N. Y.) 601, 605. But the retention by the landlord of a very small portion of the premises for a very brief time is not a bar to an action for rent. Vanderpool v. Smith, 1 Daly (N. Y.) 311.

<sup>98</sup> Hickman v. Rayl, 55 Ind. 551, 556.

are totally destroyed or rendered uninhabitable by fire after the execution of the lease but before the commencement of the term the tenant is not bound to enter nor can the landlord demand his rent and the lease is at an end by reason of the destruction of the subject matter and the total and complete inability of the lessor to perform.<sup>99</sup> Inasmuch as a lease of an entire premises consisting of several floors for a single consideration is an entire contract, a delivery of a portion of the premises does not constitute such a performance of the agreement of the lessor as will enable him to apportion the rent and recover for the part actually occupied by the lessee. The lessee, by continuing in possession of a part after the lessor's refusal to deliver the remainder, waives no right to insist upon a full performance and incurs no liability for rent for any portion of the premises.<sup>1</sup>

<sup>99</sup> Wood v. Hubbell, 5 Barb. (N. Y.) 601, 605 in which the court says "If the lessor refuses to give possession, surely he can have no claim to the payment of rent and I think it equally clear that he has none where he is unable to do so. In either case the consideration on which the promise to pay rent rests, fails."

<sup>1</sup> McClurg v. Price, 59 Pa. St. 420, 424, 98 Am. Dec. 356; Hay v.

Cumberland, 25 Barb. (N. Y.) 594; *contra*, Hurlbut v. Post, 1 Bosw. (N. Y.) 28, 14 N. Y. Super. Ct. Rep. 28; Smart v. Allegaert, 14 Phila. (Pa.) 179; and see Prior v. Cisco, 81 Mo. 241. The voluntary surrender of possession of a part of the demised premises of which a tenant has possession cannot be taken advantage of by him in diminution of the rent. Lettice v. Honnold, 63 Ill. 335.

## CHAPTER XXVIII.

### THE SURRENDER OF THE LEASE.

- § 703. The surrender of a lease defined.
- 704. The surrender of a written lease; when required to be in writing.
- 705. The language of a surrender in writing.
- 706. Surrender by implication or operation of law.
- 707. The execution of a new lease by the parties to the old lease as a surrender.
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- 711. The surrender of a portion of the premises.
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- 721. A surrender made by joint lessees.
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- 724. The consideration for an agreement in writing to surrender.
- 725. The merger of the term with the reversion.
- 726. The doctrine of merger is applicable only to concurrent estates.
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- 728. The resumption of the possession by a landlord as an acceptance of a surrender.
- 729. The destruction of the written lease.
- 730. The effect of a surrender upon the lease.

§ 703. **The surrender of a lease defined.** A surrender is a yielding up of the term to the reversioner or remainder man by mutual agreement or by operation of law.<sup>1</sup> A surrender is

<sup>1</sup>Huling v. Roll, 43 Mo. App. 227; Churchill v. Lammers, 60 Mo. 234; Buck v. Lewis, 46 Mo. App. 244.

either by express words by which a lessee manifests his intention of giving his possession or by the operation of law, which happens when the parties without an express surrender do some act which implies that they have both agreed to consider the surrender as made.<sup>2</sup> A surrender differs from an eviction in that there is always the presumption of an agreement in the case of a surrender, whereas in an eviction the termination of the lease is not based on a presumption of an agreement to terminate it, but rather the presumption is against any agreement. In the case of an eviction the lease comes to an end by the wish of the landlord and without the desire of the tenant, whereas in the case of a surrender it is presumed to come to an end by the desire of both parties. A merger very closely resembles a surrender. By some of the authorities the term surrender is used where merger is intended, but a surrender differs from a merger in that there is no presumption of any agreement in the case of the merger. A merger is presumed not because the parties agreed to it but, from the necessity of the case for the reason that neither party to the contract can at the same time be both landlord and tenant.

**§ 704. The surrender of a written lease; when required to be in writing.** By the Statute of Frauds it is required that the surrender of leases of a certain character and length of time shall be by a deed or writing signed by the parties to be charged or by operation of law.<sup>3</sup> The provisions of the Statute

<sup>2</sup> Beall v. White, 94 U. S. 382, 389, 24 L. Ed. 173. "A surrender, as the term is used in the law of landlord and tenant, is the yielding up of the estate to the landlord so that the leasehold interest becomes extinct by mutual agreement between the parties." Martin v. Stearns, 52 Iowa 345, 347, 3 N. W. Rep. 92; Scheffelin v. Carpenter, 15 Wend. (N. Y.) 400, 405. A surrender is a yielding the estate to the landlord so that the leasehold interest becomes extinct by the mutual agreement between the parties. It is either by express words, by which the les-

see manifests his intention of yielding up his interest in the premises, or by operation of law, when the parties without express surrender do some act which implies they have both agreed to the surrender." Huling v. Roll, 43 Mo. App. 234, 239.

<sup>3</sup> Lamar v. McNamee, 10 G. & J. (Md.) 126; Rowan v. Little, 11 Wend. (N. Y.) 616; Peters v. Barnes, 16 Ind. 210; Bailey v. Wells, 8 Wis. 141; Logan v. Barr, 4 Harr. (Del.) 546; Hesseltine v. Seaver, 16 Me. 212.

differ in the various States and the Statute itself should always be consulted. In the absence of any statute a surrender may be by parol. Thus, at common law, before the English Statute of Frauds was enacted, leases could be surrendered without a writing.<sup>4</sup> As an exception to the rule that leases must be surrendered by a writing it is unquestionably true as a settled principle of law that a lease may be surrendered without writing, within the Statute where the surrender is by operation of law. A surrender by operation of law takes place where a new lease is made by the parties. These surrenders by operation of law are sometimes called "implied surrenders." They occur where the intention of the parties to make the surrender is implied from the circumstances proved in the case aside from proof of any writing. The circumstances are and of necessity must invariably be proved by parol evidence consisting usually of the acts of the parties; sometimes accompanied by proof of oral statements made at the time of their acts. From this oral evidence the court may imply an intention to make and accept a surrender. And if the acts are sufficient for this presumption of an intention to surrender the case will be taken out of the Statutes. Hence it follows that surrenders by implication of law are surrenders sustained by parol proof or surrenders which are proved by parol evidence, and usually the evidence shows an executed parol agreement to make and accept a surrender. If there be no executed surrender then the presumption of an intention to make the surrender is not recognized. And the main reason why the Statute of Frauds is not applicable is that the agreement has been fully executed and carried out by the parties and that to permit either one of them to repudiate the natural consequences of his conduct would be unfair and inequitable and would result in the manifest repudiation of the principle of estoppel which is recognized both at the common law and in equity. Hence, it follows that it can be said without denial that a lease in writing and under seal may be abrogated, cancelled and surrendered by the parol agreement of the parties to the lease provided that this parol agreement was executed or carried into effect by them.<sup>5</sup> A surrender by parol carried

<sup>4</sup>Lynch v. Lynch, 6 Ir. 7 R. 131;  
Lyon v. Reed, 13 M. & W. 285,  
Co. Litt. 336 A; Perkin, v.  
Perkins, Cro. Eliz. 269.

<sup>5</sup>Hayes v. Goldman, 71 Ark. 251,  
72 S. W. Rep. 563; Silva v. Bair,  
141 Cal. 599, 75 Pac. Rep. 172;  
Bloomquist v. Johnson, 107 Ill.

out and fully executed by the parties is termed a surrender by implication of law and is not within the provisions of the Statute of Frauds. It is imperative, however, that the parol agreement to surrender a lease shall be executed by the parties in order that it shall be a surrender.<sup>6</sup> These parol surrenders usually consist of acts, and statements of the parties to a written lease from which an intention may be inferred that a surrender has been made. There is usually an abandonment of the premises by the tenant, and an entry into possession or some equivalent act on the part of the landlord, such as letting the premises to a new tenant. Thus, a lease under seal may be regarded as sur-

App. 154; *Baker v. Pratt*, 15 Ill. 568; *Bull v. Griswold*, 19 Ill. 631; *Ward v. Walton*, 4 Ind. 75; *Stockton v. Stockton*, 40 Ind. 225; *Evans v. McKanna*, 89 Iowa 362, 56 N. W. Rep. 528; *Talbot v. Whipple*, 14 Allen. (Mass.) 177; *Amory v. Kannofsky*, 117 Mass. 351; *Drew v. Billings-Drew*, 9 Detroit Leg. N. 513, 92 N. W. Rep. 774; *Churchill v. Lammers*, 1 Mo. App. Rep. 155; *Buffalo County Nat. Bank v. Hanson*, 34 Neb. 752, 51 N. W. Rep. 1033; *Wheeler v. Walden*, 17 Neb. 122, 22 N. W. Rep. 346; *Dennis v. Miller*, (N. J. L.) 53 Atl. Rep. 394; *Kelly v. Noxon*, 64 Hun. (N. Y.) 281, 18 N. Y. Supp. 909; *Talman v. Earle*, 17 N. Y. Supp. 7, 18 N. Y. Supp. 605; *Hurley v. Sehring*, 62 Hun. 621; *Hooks v. Forst*, 165 Pa. St. 238, 30 Atl. 846; *Hart v. Pratt*, 19 Wash. St. 560, 53 Pac. Rep. 711, 712; *Commercial Hotel Co. v. Brill*, 123 Wis. 638, 101 N. W. Rep. 1101; *Beall v. White*, 94 U. S. 389; *Holman v. De Lin River Co.*, 30 Oreg. 428, 47 Pac. Rep. 708; *National Union Building Ass'n v. Brewer*, 41 Ill. App. 223; *Hyman v. Jockey Club etc. Co.*, 9 Colo. App. 299, 48 Pac. Rep. 671, 673.

\**Otis v. McMillan*, 70 Ala. 46; *Williamson v. Crossett*, 62 Ark. 623, 36 S. W. Rep. 27; *Hayes v. Goldman*, 71 Ark. 251, 72 S. W. Rep. 563; *Nachbour v. Wiener*, 34 Ill. App. 237, 243; *Ryan v. Kirchberg*, 17 Ill. App. 132, 135; *Evans v. McKanna*, 89 Iowa 362, 365, 56 N. W. Rep. 527; *McKenzie v. Lexington*, 4 Dana (Ky.) 129; *Talbot v. Whipple*, 14 Allen (Mass.) 180; *Donkersley v. Levy*, 38 Mich. 54, 60; *Huling v. Roll*, 43 Mo. App. 234; *Buck v. Lewis*, 46 Mo. App. 227; *Churchill v. Lammers*, 60 Mo. App. 244; *Prior v. Kizo*, 81 Mo. 241; *Buffalo County Nat. Bank v. Hanson*, 34 Neb. 455, 51 N. W. Rep. 1035; *Kittle v. St. John*, 7 Neb. 73; *Stotesburg v. Vail*, 13 N. J. Eq. 390; *Springstein v. Schemerhorn*, 12 Johns (N. Y.) 357; *Van Rensselaer's Heirs v. Penniman*, 6 Wend. (N. Y.) 569; *Smith v. Niver*, 2 Barb. (N. Y.) 180; *Leyman v. Abeel*, 16 Johns (N. Y.) 30; *Whitney v. Myers*, 8 N. Y. Super. Ct. 266; *Williams v. Vanderbilt*, 145 Pa. St. 238, 34 N. E. Rep. 476, 477, 36 Am. St. Rep. 486, 21 L. R. A. 489; *Kneeland v. Schmidt*, 78 Wis. 345, 47 N. W. Rep. 438, 11 L. R. A. 498; *Scotts v. Hawsman*, 21 Fed. Cases 12532, 2 McLean C. C. 180.

rendered by parol where the tenant abandons the premises, and the landlord enters thereon, or where the landlord executes a new lease to a new tenant with the consent of the old tenant, and the new tenant enters. The landlord may by a written contract release the old tenant from his liability under the lease, or he may do it by the acceptance of a new tenant or making a new lease with the old tenant though there be no change of possession by the mutual consent of the parties. Though a lease under seal may be surrendered by parol, or by a lease not under seal yet,<sup>7</sup> if there is a stipulation in the written lease that it may be surrendered on notice in writing by the tenant, a mere oral offer to surrender it is not sufficient, unless the landlord has by his conduct waived the written offer. The waiver of the stipulation for a written surrender will not be presumed unless the evidence of facts from which it might be reasonably inferred is very clear.<sup>8</sup>

**§ 705. The language of a surrender in writing.** Under the Statute of Frauds a deed is not absolutely essential to constitute a surrender in writing. The Statute requires a surrender "by deed or note in writing signed by the parties to be charged." No particular form of words is required to be employed to constitute a valid surrender in writing.<sup>9</sup> Any language which shows an intention on the part of both parties to make and accept a surrender is sufficient. Thus, a writing to the effect that the "lessee doth discharge the premises from the

<sup>7</sup> Duncan v. Moloney, 115 Ill. App. 522.

<sup>8</sup> Kittle v. St. John, 7 Neb. 73. "A surrender is implied and so effected, by operation of law within the statute quoted, when another estate is created by the reversioner or remainderman, with the assent of the termor, incompatible with the existing estate or term. In the case of a term for years, or for life, it may be the acceptance by the lessee or termor, of an estate incompatible with the term, or by the taking of a new lease by the lessee. It will not be implied against the intent of the parties

as manifested by their acts and when such intention cannot be presumed without doing violence to common sense, the presumption will not be supported \* \* \* The furthest that our courts have gone is to hold that, to effect a surrender of an existing lease by operation of law, there must be a new lease valid, in law, to pass an interest according to the contract and intention of the parties." By the Court Allen, J. in Coe v. Hobby, 72 N. Y. 145.

<sup>9</sup> 2 Roll. Abr. 497, 498; Chamberlain's Case, 4 Mod. 151; Weddall v. Capes, 1 M. & W. 5052.

term”<sup>10</sup> or that “the lessee is content that the lessor shall have the land”<sup>11</sup> or to the effect that it is, “the lessee’s will that the lessor should re-enter upon the land”<sup>12</sup> is a sufficient surrender in writing. So, also, a writing to the effect “it is agreed that the lessor shall have the house on the premises mentioned in the lease and he is to pay a sum of money over and above the rent annually toward the good will already paid by the lessee” is a surrender.<sup>13</sup> A statement by the tenant “that we hereby renounce, disclaim, and also surrender and yield up all right to tenancy from year to year” is a valid surrender.<sup>14</sup> A distinction is made between a present surrender in writing and an agreement in writing to execute a surrender at some future date. Whether a writing is a present surrender or merely an agreement for a future surrender must be determined by the court according to the intention of the parties as manifested by the language used in the instrument. As regards an agreement to make a future surrender it may be said that a tenant of a term to begin in the future cannot execute a valid surrender in writing of the future term because, until he enters there is no term upon which the surrender would operate. But the tenant who has a right to enter at a future date may make an implied surrender before that date and while his written surrender might not be enforceable as a surrender, yet, in equity at least it would be recognized either as an assignment of his rights or as a release of his rights to his landlord. There must always be a valid consideration for the surrender of a lease in writing. A money consideration, however small, will be sufficient. The written surrender will not be invalid for lack of consideration where it is carried out by the parties. The formal re-delivery, cancellation or destruction of a written lease or instrument creating the term may be dispensed with in the case of a written surrender. All that is necessary is the written agreement signed by both parties or signed by one and assented to by the other, manifesting an intention to surrender and based on a good con-

<sup>10</sup> Earl v. Rogers, 2 Wils. 26; <sup>12</sup> Penruddock v. Newman, 1 Mason v. Treadway, 1 Lev. 145. Leon 279.

<sup>11</sup> Sleigh v. Bateman, Cro. Eliz. 487; Smith v. Mapleback, 1 T. R. 441. <sup>13</sup> Smith v. Mapleback, 1 T. R. 441.

441. <sup>14</sup> Wyatt v. Stagg, 5 Bing. (N. O.) 564.

sideration, or if there be no consideration then there must be a delivery or yielding up of the possession of the premises to the landlord by the tenant.<sup>15</sup>

**§ 706. A surrender by implication or operation of law.** A surrender of the lease may be made not only by an express agreement between the parties to it, but by some act on the part of the party against whom the surrender is claimed. Under this rule a surrender need not be by express words but may be implied from the conduct of the parties. This latter species of surrender is called a surrender by operation of law, and it is said that if the acts of the parties would reasonably permit a surrender to be inferred, the court will construe their acts as being equivalent to a surrender.<sup>16</sup> The doctrine of surrender by operation of law, is based upon the doctrine of estoppel, and arises where the owner of the premises is a party to an act in conjunction with some act on the part of the tenant, the validity of which act the owner or landlord is estopped from denying.<sup>17</sup> The whole subject is regulated by the general principles governing the law of estoppel. What conduct in any case shall constitute such an acceptance of a surrender of the premises by the landlord as will create an estoppel on him is for the jury,<sup>18</sup> where the evidence is contradictory. If the evidence shows that the tenant has abandoned the premises either actually or constructively, and if it also appears that the landlord has after the abandonment so acted in relation thereto that it would be inequitable and unjust to permit him to deny the validity of his acts a surrender by implication takes place. In other words, the acceptance of the abandonment on the part of the landlord being a matter of intention, it will be presumed that he intended to accept it as a surrender where the tenant abandoned the premises if his conduct in reference thereto was such as would justify a reasonable man in drawing an inference of an intention to accept. A surrender is implied and so effected by operation of

<sup>15</sup> Greider's Appeal, 5 Pa. St. 422. W. Rep. 978; Dayton v. Craik, 26 Minn. 133, 1 N. W. Rep. 813.

<sup>16</sup> Martin v. Stearns, 52 Iowa 345, 347, 3 N. W. Rep. 92; Mitchell v. Blossom, 24 Mo. App. 48; Nelson v. Thompson, 23 Minn. 508; Smith v. Pendergast, 26 Minn. 318, 3 N. "Huling v. Roll, 43 Mo. App. 234. "Kneeland v. Schmidt, 78 Wis. 345, 348, 47 N. W. Rep. 438.

law within the statute when another estate is created by the reversioner or remainderman with the assent of the tenant or which is incompatible with the existing state or term.<sup>19</sup> This is called a surrender by operation of law.<sup>20</sup>

<sup>19</sup> *Shahan v. Herzberg*, 73 Ala. 59, 63; *Wheat v. Watson*, 57 Ala. 581; *Hesseltine v. Seavey*, 16 Me. 212; *Talbot v. Whipple*, 14 Allen (Mass.) 177; *Amory v. Kannofsky*, 117 Mass. 351, 354; *Shepard v. Spaulding*, 4 Met. (Mass.) 416, 418; *Logan v. Anderson*, 2 Doug. (Mich.) 101; *Nelson v. Thompson*, 23 Minn. 508; *Smith v. Thayer*, 56 Minn. 93, 57 N. W. Rep. 329; *Smith v. Pendergast*, 26 Minn. 318, 3 N. W. Rep. 978; *Bowen v. Haskell*, 53 Minn. 480, 55 N. W. Rep. 629; *Churchill v. Lammers*, 1 Mo. App. Rep. 155, 60 Am. App. 244; *Clemens v. Brownfield*, 19 Mo. 118, *Huling v. Roll*, 43 Mo. App. 234, 239; *Matthews' Admr. v. Tobener*, 39 Mo. 115; *Wheeler v. Walden*, 17 Neb. 122, 22 N. W. Rep. 346; *Buffalo Co. Nat. Bank v. Hanson*, 34 Neb. 752, 51 N. W. Rep. 1035; *Elliott v. Aiken*, 45 N. H. 36; *Lewis v. Angermiller*, 89 Hun. 65, 66, 35 N. Y. Supp. 69. *Peters v. Newkirk*, 6 Cow. (N. Y.) 108; *Bailey v. Delaplaine*, 1 Sandf. (N. Y.) 5; *Gray v. Kaufman Dairy Ice Cream Co.*, 162 N. Y. 388, 56 N. E. Rep. 903; *Coe v. Hobby*, 72 N. Y. 145; *Bedford v. Terhune*, 30 N. Y. 463, 86 Am. Dec. 364; *Smith v. Kerr*, 108 N. Y. 36, 15 N. E. Rep. 70; *Underhill v. Collins*, 132 N. Y. 271, 30 N. E. Rep. 576; *Witman v. Watry*, 31 Wis. 638; *Beardman v. Wilson*, L. R. 4 C. P. 57; *Thomas v. Cook*, 2 B. & Ald. 119; *Walker v. Richardson*, 2 Mee. & Wel. 882; *Grimman v. Legge*, 8 B. & C. 324; *Dodd v. Acklom*, 6 Man & Gr. 672; *Walls v. Atcheson*, 3 Bing. 462; *Lloyd v. Landford*, 2 Mod. 174; *Hall v. Burgess*, 5 B. & C. 333; *Reeve v. Bird*, 1 C. M. & R. 37; *Crowley v. Vitty*, 7 Ex. 319, 321, 21 L. J. Ex. 135; *Creagh v. Blood*, 3 Jr. & Lat. 133; *Lynn v. Reed*, 13 M. & W. 285; *Nickells v. Atherstone*, 10 Q. B. 944, 59 E. C. L. R. 59; *Buckworth v. Simpson*, 1 C. M. & R. 834. *Panther Lead Co. In re*, 65 L. J. Ch. 499, 1 Ch. 978, 44 W. R. 573, 3 Manson 165. In the case of *Lyon v. Reed*, 13 Mee. & Wel. 285, 13 L. J. Ex. 377, 8 Jur. 762, Baron Parker says: "that term (we surrender) is applied to cases where the owner of a particular estate has been a party to some act the validity of which he is by law afterward estopped from disputing, and which would not be valid if his particular estate had continued to exist. There the law treats the doing of such act as amounting to a surrender. Thus, if the lessee for years accepts a new lease from his lessor, he is estopped from saying that his lessor had not power to make the new lease; and as the lessor could not do this until the prior lease had been surrendered, the law says that the acceptance of a new lease is of itself a surrender of the former." See, also, as approving this case, *Creagh v. Blood*, 3 Jo. & Lat. 138, 8 Ir. Eq. R. 688, and *Thomas v. Cook*, 2 B. & Ald. 119, 20 R. R. 374.

<sup>20</sup> For definitions see: *Welcome*

**§ 707. The execution of a new lease by the parties to the old lease as a surrender.** The making of a new lease of the same premises by the parties to an existing lease during the existence of the latter followed by a continuance of the former occupation by the tenant, is in its effect a surrender of the old lease,<sup>21</sup> and the old lease may be surrendered by the making of a new one, though the new one is for a much shorter period than the old one.<sup>22</sup> So a written lease may be surrendered by the making of an oral lease if the oral lease is valid, though if it is invalid there will be no surrender.<sup>23</sup> In order that a new lease may constitute a surrender of an existing one, it must be provided in the new lease that the lessee is to go into possession at once, though perhaps even if this is not expressly provided for the fact that he goes into possession or continues into possession with a different rent than that payable under the old lease or under different terms would dispense with a provision in the lease that possession is to be taken immediately.<sup>24</sup> If the second lease is expressly made to take effect in the future after the termination of the first lease, there is no surrender because the second lease is reversionary and its existence being in the future is consistent with the continued existence of the first lease.<sup>25</sup> If for any reason the new lease is void or is unen-

v. Hess, 90 Cal. 507, 27 Pac. Rep. 369, 370, 25 Am. St. Rep. 145; Williams v. Vanderbilt, 145 Ill. 238, 34 N. E. Rep. 476, 477, 36 Am. St. Rep. 486, 21 L. R. A. 489; Brown v. Cairns, 107 Iowa, 727, 737, 77 N. W. Rep. 478; Wheeler v. Walden, 17 Neb. 12, 22 N. W. Rep. 346.

"It is needless to multiply examples; all the old cases will be found to depend on the principle to which we have adverted, namely, an act done by or to the owner of a particular estate, the validity of which he is estopped from disputing, and which could not have been done if the particular estate continued to exist." By Baron Parke in Lyon v. Reed, 13 M. & W. 285.

<sup>21</sup> Bowman v. Wright, 65 Neb. 661, 91 N. W. Rep. 580; Walsh v. Martin, 69 Mich. 29, 37 N. W. Rep. 40; Wrottesley v. Adams, 2 Dyer, 177, Corbett's case, 3 Dyer 280a; Colbourne v. Mixstone, 1 Leon, 129; Swaine v. Homan, Hob. 203, 204; Johnstone v. Huddleston, 4 B. & Cres. 922, 934; Lyon v. Reed, 13 Mee. & Wel. 285; Davison v. Stanley, 4 Burr. 2210.

<sup>22</sup> Ive's case, 5 Coke 11, a, b; Bernard v. Bonner, Alleyn, 58, 59, Shep. Touch. 301.

<sup>23</sup> Whitley v. Gough, 2 Dyer, 140, B. Pl. 43; Timbrell v. Bullock, Sty. 446; Thomas v. Cooke, 2 Stra. 408.

<sup>24</sup> Ive's Case, 5 Coke, 11 a, b.

<sup>25</sup> Doe d. Rawlings v. Walker, 5 B. & C. 111.

forcible, or does not convey to the tenant the interest or term which he assumed he was contracting to receive, then the execution of the new lease cannot be considered to constitute a surrender of the old lease, and the old lease survives and continues in effect.<sup>26</sup> A mere agreement between the landlord and the tenant to make a lease can never operate as a surrender unless it is carried into effect and a new lease is actually made under which the tenant continues in possession. So it has been held in England that a tenancy is not surrendered by an agreement whereby the landlord under an existing lease, agrees to let to the tenant at a valuation to be made by arbitrators with a stipulation for security by the tenant for rent when no valuation is made, and no security is given by the tenant.<sup>27</sup> The acceptance

<sup>26</sup> Whitney v. Myers, 1 Duer (N. Y.) 266, 271; Schieffelin v. Carpenter, 15 Wend. (N. Y.) 405, 406; Coe v. Hobby, 72 N. Y. 146; Eton v. Luyster, 60 N. Y. 252; Chamberlain v. Dunlop, 126 N. Y. 45, 51, 26 N. E. Rep. 966, affirming 54 Hun. 639, 8 N. Y. Supp. 125; Abbott v. Parsons, 3 Burr. 1807; Earl of Egremont v. Courtney, 11 Q. B. 702; Wilson v. Sewell, 4 Burr. 1975, 1980; Davidson d. Bromley v. Stanley, 4 Burr. 2210; Brewster v. Parrot, Cro. Eliz. 264; Loyd v. Gregory, Cro. Car. 502; Roe v. Archbishop of York, 6 East 86; Hamerton v. Stead, 3 B. & C. 478, 481; Bishop of Rochester v. Bridges, 1 B. & Ad. 847; Lowther v. Troy, 1 Ir. T. R. 162, Com. Dig. Tit. Estates, (G. 13). "In England the rule is, that if there be a tenancy under lease, and the parties make a verbal agreement, for a sufficient consideration, that instead of the existing term there shall be a tenancy from year to year, at a different rent, that would not be a surrender of the lease by operation of law. Fouquet v. Moor, 7 Exch. 870.

The farthest that our courts have gone is to hold that to effect a surrender of an existing lease by operation of law, there must be a new lease, valid in law, to pass an interest according to the contract and intention of the parties. Within this rule there was no surrender of the lease upon which this action is brought. There was no new lease which could take effect according to the verbal contract of the parties as stated by the defendant." Coe v. Hobby, 72 N. Y. 141.

<sup>27</sup> John v. Jenkins, 1 C. & M. 227, 3 Tyr. 170, 2 L. J. Ex. 83. "Where the new lease does not pass an interest according to the contract, the acceptance of it will not operate as a surrender of the former lease; that, in the case of a surrender implied by law from the acceptance of a new lease, a condition ought also to be understood as implied by law, making void the surrender in case the new lease shall be made void; and that, in case of an express surrender, so expressed as to show an intention of the parties

of a new lease which is afterwards shown to be void contrary to the intention of the parties but which has operated to pass some of the term contracted for does not constitute a valid surrender of the term. Thus where a life tenant with a power of leasing for terms of years leased land by a deed which afterwards proved not to have been a good execution of the power and in consideration of this lease two prior leases were surrendered it was held after the death of the life tenant who had made the void leases that his new lease did not operate as a surrender of the two prior leases though so intended by the parties.<sup>28</sup> So where after the death of the lessor an agent assuming to represent his heirs made a new lease which purported to convey all the interest of the heirs for a term of years but which was not signed by the widow of the lessor and which did not bind one of the heirs because he was an infant it was held that no surrender of the old lease took place. No surrender of the old lease will be implied under such circumstances for it is very clear that the tenant would not receive what he had expected to acquire when he executed the lease. The acceptance of the lease by the lessee was based upon his assumption that he was dealing with the agent of all those who had succeeded to the interest of his lessor, and, when he discovered his error, he had a right to stand upon his former lease under which he was still in possession.<sup>29</sup> A lessee who accepts a new lease from his lessor during the term is on general principles estopped from claiming the lessor had no

to make the surrender only in consideration of the grant the sound construction of such instrument, in order to effectuate the intention of the parties would make that surrender also conditional to be void in case the grant should be made void." By Coleridge, J. in *Doe d. Earl of Egremont v. Courtenay*, 11 Q. B. 702, 17 L. J. Q. B. 151, 12 Jur. 454, relying on *Wilson v. Sewell*, 4 Burr. 1980; *Davison d. Bromley v. Stanley*, 4 Burr. 2212; compare *Doe d. Egremont v. Forwood*, 3 Q. B. 627; *Roe d. Berkeley v. Tax.* 6 East 86; *Doe d. Bishop of Roch-*

*ester v. Bridges*, 1 B & Ad. 847; *Zouch d. Abbot v. Parsons*, 3 Burr. 1794, 1807, in which case it was said "no surrender, express or implied, in order to or in consideration of a new lease would bind, if the new lease is absolutely void, for the cause, ground and condition of the surrender fails."

<sup>28</sup> *Biddulph v. Poole*, 11 Q. B. 713; *Earl of Berkeley v. Arch-bishhop of York*, 6 East 86.

<sup>29</sup> *Chamberlain v. Dunlop*, 126 N. Y. 45, 54, 26 N. E. Rep. 966, affirming 54 Hun. 639, 8 N. Y. Supp. 125, 126.

power to grant it. The estoppel is mutual, and, as there cannot be two or more concurrent leases of the same premises to the same lessee, it will be presumed that the first lease has been surrendered. The execution of the new lease by the lessor is by implication an acceptance of the surrender of the old lease. The parties need not have intended that a surrender shall take place for the surrender and its acceptance will be implied irrespective of their intention on account of the necessity of avoiding the manifest injustice to the tenant of holding him liable under two concurrent leases of the same premises.<sup>30</sup> For if the making of a new lease is a surrender then the former lease and all the rights and obligations which it has created are forever at an end. The lessor having executed a new agreement of leasing, must stand by his latest contract and must accept its burdens as well as its benefits. He cannot play fast and loose with the rights of his tenant and claim to hold him liable under either of the two leases as may suit his own interests. He can no more repudiate the obligations of the second lease to which he has expressly assented than he could have repudiated his liability under the earlier lease if the later lease had never been executed.<sup>31</sup>

<sup>30</sup> *Enyeart v. Davis*, 17 Neb. 228, 236, 22 N. W. Rep. 449.

<sup>31</sup> In the case of *Coe v. Hobby*, 72 N. Y. 141, the court said, "A surrender is the restoring and yielding up of an estate in lands to one who has an immediate estate in reversion or remainder, and by the statute of frauds, a term exceeding one year cannot be surrendered, unless by act or operation of law, or by a deed conveyance in writing, 2 R. S. 134, sec. 6. A surrender is implied and so effected by operation of law within the statute quoted, when another estate is created by the reversioner or remainderman, with the assent of the termor incompatible with the existing estate or term. In the case of a term for life or years it may be by the acceptance by the lessee or

termor of an estate incompatible with the term, or by the taking of a new lease by the lessee. It will not be implied against the intent of the parties as manifested by their acts; and when such intention cannot be presumed without doing violence to common sense, the presumption will not be supported. *Van Rensselaer's Heirs v. Penniman*, 6 Wend. (N. Y.) 569. In the case referred to, the devisee of the lessor had made a new lease to the assignee of the lessee for the same time, and upon the same conditions as the first lease, but it was held that the original lease was not thereby surrendered, but remained in force, entitling the lessee and his assignee to the benefits of its provisions, and that under the circumstances the new lease was

**§ 708. Setting aside a surrender in writing as obtained by fraud.** A writing which is signed by the lessor or his duly authorized agent at the request of the lessee may operate as a surrender.<sup>32</sup> By the statute of frauds it is generally provided that no lease which is required by the statute to be in writing can be cancelled or surrendered except by a writing except in those cases where a surrender is implied by operation of law. If a writing which is claimed to operate as a surrender of a lease has been obtained by fraud or misrepresentation on the part of the lessee it may be set aside in equity upon the general principles of fraud.<sup>33</sup> The fraud will have to be shown by clear and satisfactory evidence and under the general rules regulating the rescission, cancellation and reformation of written contracts in equity because of fraud and misrepresentation. If a landlord signs a receipt in full for all rent due under a written lease with-

given to confirm the prior lease, and to give the lessee greater security for his improvements than he had by the first lease. There is an implication of intention to surrender an existing lease upon the giving of a second lease, for the reason that the lessor cannot legally execute a second lease of the same premises during the term of a first lease; and when the lessee accepts a second term unexplained he admits the power of the lessor which he cannot legally have without a surrender of the first. The presumption of law is therefore, that a surrender has been made. *Livingston v. Potts*, 16 John. (N. Y.) 28; *Schieffelin v. Carpenter*, 15 Wend. (N. Y.) 400. It is said in that case by Nelson, J. that unless such new lease be executed so as to pass an interest according to the contract and intention of the parties, it will not operate as a surrender of the prior lease by operation of law. And it was so held where there was a parol letting for a

term of years to third persons who had entered into possession and paid rent to the landlord for a portion of the term agreed upon. The conclusion was that a valid parol lease, since the statute of frauds might produce a surrender in law and that the true rule was as laid down in Starkie Evidence 342, that the taking a new lease by parol is by operation of law a surrender of the old one although it be by deed provided, it be a good one, and pass an interest according to the contract and intention of the parties; for otherwise the acceptance of it is no implied surrender of the old one. See also, *Bedford v. Terhune*, 30 N. Y. 453, approving this case. See, also, *Rowan v. Lytle*, 11 Wend. (N. Y.) 617; and *Lawrence v. Brown*, 5 N. Y. 394.

<sup>32</sup> *Jenkins v. Clyde Coal Co.* 82 Iowa 618, 621, 48 N. W. Rep. 970.

<sup>33</sup> *Jenkins v. Clyde Coal Co.* 82 Iowa 618, 621, 48 N. W. Rep. 970.

out taking the trouble to read it and the receipt signed by him also contains a statement over his signature that the lease is surrendered and all rights against the tenant are released the landlord cannot subsequently have the writing set aside so far as it is a surrender unless he shall show that this failure to read the receipt was the outcome of fraud practiced by the lessee.<sup>34</sup> So, also, in the case of a surrender which is based upon the acceptance of a new tenant by the landlord, if the old tenant has been guilty of any fraud in inducing the landlord to accept the new tenant, as for example, if he knew that the new tenant was insolvent or irresponsible and he recommended him to the landlord as solvent, the surrender thus procured will be set aside as fraudulent.<sup>35</sup>

**§ 709. The effect of a surrender on the under tenants.** A lessee who has granted a sublease can not by a surrender of his term to his lessor, prejudice any of the rights of his under-tenant. The sub-tenant if he remain in possession after the surrender will be presumed to have attorned to the original lessor, and it will be also presumed that he holds under the terms of the lease which has been surrendered.<sup>36</sup> A landlord who accepts a surrender from his tenant while a sub-tenant is in possession, takes the surrender with implied notice of the rights of the sub-tenant and is bound by any right the sub-tenant may have as respects fixtures and improvements.<sup>37</sup> After the failure of the original lessee to pay rent due by him, the sub-tenant may pay his rent to the original lessor, in order to protect his own possession.<sup>38</sup> At common law though a tenant who had made a sub-

<sup>34</sup> Jenkins v. Clyde Coal Co. 82 Iowa, 618, 48 N. W. Rep. 970.

<sup>35</sup> Bruce v. Ruler, 2 M. & R. 3.

<sup>36</sup> Weiss v. Mendelson, 24 Misc. Rep. 692, 53 N. Y. Sup. 803, 87 N. Y. St. Rep. 803; Appleton v. Ames, 150 Mass. 34, 22 N. E. Rep. 69, 5 L. R. A. 206; Oshinsky v. Greenberg, 39 Misc. Rep. 342, 79 N. Y. S. 853; Adams v. Goddard, 48 Me. 121; Eten v. Luyster, 60 N. Y. 252, 259; Hessel v. Johnson, 129 Pa. St., 173, 177, 18 Atl. Rep. 945, 15 Am. St. Rep. 715; compare Wil-

liams v. R. R. Co. 10 Del. Law N. 238; G. N. Ry. Co. v. Smith, 45 L. J. Ch. 235, 2 Ch. D. 235, 34 L. T. 267, 24 W. R. 443, 3 App. Cas. 165, 47 L. J. Ch. 97, 37 L. T. 645.

<sup>37</sup> Morrison v. Sohn, 90 Mo. App. 76.

<sup>38</sup> Raubitscheck v. Semken, 4 Abb. New Cases (N. Y.) 205n; Peck v. Ingersoll, 7 N. Y. 528.

An illustration of the rule that a tenant cannot by a surrender to his landlord prejudice the rights of those parties is found in Clem-

lease cannot by a surrender prejudice the interest of his tenant, yet by a surrender he loses the right to distrain for rent reserved under his under lease. The rent being an incident to his reversion he can no longer collect it as rent for by the surrender he has parted with his reversion. Nor can the original lessor to whom the surrender has been made collect his lessee's rent by a distress because the reversion to which it was an incident has been merged in the greater reversion of which he was already possessed.<sup>39</sup> By statute in England<sup>40</sup> it has been provided that if a lease be surrendered, in order to be renewed, and a new lease given, the relation of landlord and tenant between the original lessee and his under-lessee shall be preserved and that the chief lessor, his lessee and the under-lessee shall continue in the same situation so far as their rents, remedies and rights are concerned as if no surrender had been made. This statute has been re-enacted in some of the states of the Union.

**§ 710. The delivery of the keys as evidence of a surrender.** To what extent the delivery of the keys of the demised premises by the tenant to his landlord, or to an agent of the landlord shall constitute an element in determining whether the landlord has accepted a surrender depends upon all the facts and circumstances of each particular case. The mere delivery

ents v. Matthews, 52 L. J. Q. B. 772, 11 Q. B. D. 808. The tenant of a farm assigned his growing crops, etc., to a stranger and then, without notice to his assignee agreed to surrender to his landlord. Subsequently, but before the surrender was actually effected, the assignee by reason of a default by the tenant entered and took possession, being still in ignorance of the surrender. On being subsequently notified of the surrender by the landlord he permitted the latter to enter, who thereupon cultivated and garnered the crops. An action of trover by the assignee was not sustained but it was said the assignee was entitled to equitable relief.

The surrender, though it was valid at law would not be permitted in equity to prejudice the assignee's rights, if, however, there could be no valid surrender in equity as against the assignee, then the tenant was still in possession so far as he was concerned, and the assignee, though entitled to the crops, must assume the tenant's obligations of the rent of the farm and the expenses of cultivating the crops, and as the balance was in favor of the landlord he must have judgment.

<sup>39</sup> Thier v. Barton, Moore, 94; Webb v. Russell, 3 T. R. 401; Mellor v. Watkins, L. R. 9 Q. B. 400.

<sup>40</sup> 4 Geo. II., c. 28.

of the keys by the tenant to the landlord with proof of no other act or declaration, on the part of either party to the lease, is not usually held to constitute a surrender. If the delivery by the tenant of the keys to the landlord is not accepted by him, and the keys are returned to the tenant or he is notified that they are held subject to his order, no presumption arises that a surrender of the premises was accepted by the landlord. Nor does the silence of the landlord after the keys have been delivered to him raise a conclusive presumption that he has accepted them. Generally whether or not the delivery of keys of the premises to the landlord or to his agent, and the acceptance and retention of them by such person, shall constitute a surrender is a question of fact for the jury.<sup>41</sup> The mere retention of the keys by the landlord where they have been sent to him without his request or without his assent, is not of itself the acceptance of a sur-

- <sup>41</sup> Gaines v. McAdam, 79 Ill. App. 201; Livermore v. Eddy, 33 Mo. 547; Buck v. Lewis, 46 Mo. App. 227; Matthews v. Tobener, 39 Mo. 115; Prentiss v. Warne, 10 Mo. 601; Kerr v. Clark, 19 Mo. 132; Steketee v. Pratt, 122 Mich. 80, 80 N. W. Rep. 898; Van Brunt v. Wallace, 88 Minn. 116; Lucy v. Williams, 33 Minn. 441, 23 N. W. Rep. 861, 92 N. W. Rep. 521; Conway v. Carpenter, 155 N. Y. 686, 50 N. E. Rep. 1116, affirming 30 N. Y. Supp. 315, 80 Hun, 428; Morris v. Dayton, 84 N. Y. Supp. 392; Spies v. Voss, 16 Daly 171; 30 N. Y. St. Rep. 548, 9 N. Y. Supp. 532; Kelly v. Noxon, 64 Hun, 281, 18 N. Y. Supp. 909; Ewing v. Barnard, 84 N. Y. Supp. 137; Beeston v. Yale, 78 N. Y. Supp. 158; Dorrance v. Bonesteel, 64 N. Y. Supp. 307, 309, 51 App. Div. 129; Rich v. Doyenn, 85 Hun, 510; 33 N. Y. Supp. 341; Doolittle v. Selkirk, 28 N. Y. Supp. 43, 44, 7 Misc. Rep. 722; Thomas v. Nelson, 69 N. Y. 118, 121; Morgan v. Smith, 70 N. Y. 537, affirming 7 Hun. (N. Y.) 244; Long v. Sta-  
ford, 103 N. Y. 274, 283, 8 N. E. Rep. 522; Winant v. Hines, 14 Daly 187; 6 N. Y. St. Rep. 261; Sully v. Schmitt, 147 N. Y. 248, 254, 41 N. E. Rep. 514, 49 Am. St. Rep. 659; Pier v. Carr, 69 Pa. St. 326, 328; Milling v. Becker, 96 Pa. St. 182, 185; Diehl v. Lee, (Pa. 1887) 9 Atl. Rep. 865; Marailles v. Kerr, 6 Whart. (Pa.) 500; Bowen v. Clark, 22 Oreg. 566, 30 Pac. Rep. 430, 29 Am. St. Rep. 625; Newton v. Speare Laundry Co., 19 R. I. 546, 37 Atl. Rep. 11; Oastler v. Henderson, 46 L. J. Q. B. 607, 2 Q. B. D. 575, 37 L. T. 22; Leggett v. Louisiana Purchase Exposition, (Mo. App.) 97 S. W. Rep. 976; Dodd v. Acklom, 6 Man. & G. 673, 680, 7 Scott (N. R.) 415, 13 L. J. C. P. 11; Grimman v. Legge, 8 B. & C. 324, 2 M. & R. 438; Whitehead v. Clifford, 5 Taunt. 518; Ackland v. Lutley, 1 P. & D. 636, 9 A. & E. 809, 8 L. J. Q. B. 164; Phene v. Popplewell, 12 C. B. (N. S.) 334, 31 L. J. C. P. 235, 8 Jur. (N. S.) 1104, 6 L. T. 247, 10 W. R. 523.

render. The landlord who receives the keys by mail or from the hands of a messenger, or by the tenant leaving them at his house<sup>42</sup> as where, for example, the tenant has thrown the key on the floor of the office of the landlord after the landlord has refused to accept it,<sup>43</sup> is not by the law bound to seek out the tenant and tender a return of the keys. After the complete abandonment of the premises by the lessee, the lessor has an unqualified right to receive the keys, and to enter on the property for the purpose of caring for them at a time when by the action of the tenant in leaving it it has become vacant and the danger of injury to it, and perhaps of its total destruction, has been thus greatly increased.<sup>44</sup> The landlord may receive the keys from the tenant, take possession of the premises and put up a notice upon them offering to rent them to the public and he may even relet to a new tenant and his acts in doing all these things will not be equivalent to an acceptance of a surrender where he, at the same time notifies the tenant that he does not intend to release him from the obligations under the lease or he informs him that he will continue to look to him for the rent. So the act of the tenant in leaving the key of a leased building at the place of business of the lessor over his protest and where the lessor

<sup>42</sup> Thomas v. Nelson, 69 N. Y. 118, 121, or by taking them from a place where the tenant has left them against the will or without the consent of the landlord, Long v. Stafford, 103 N. Y. 274, 283, 8 N. E. Rep. 522.

<sup>43</sup> Withers v. Larrabee, 48 Me. 570, 573; Barlow v. Wheelwright, 22 Vt. 88.

<sup>44</sup> Bowen v. Clarke, 22 Oreg. 566, 30 Pac. Rep. 430; where the lessor told the lessees that he would hold them for the rent and that he would hold the keys subject to the order of the lessees. See also, Milling v. Becker, 96 Pa. St. 182, 185; Pier v. Carr, 69 Pa. St. 326, 328. The receipt of the keys by mail, Thomas

v. Nelson, 69 N. Y. 118, or taking the keys for the purpose of reletting the premises on account of the tenant, Morgan v. Smyth, 70 N. Y. 527, or receiving the keys for the purpose of putting up a "to-let" sign, Pier v. Carr, 69 Penn. St. 316, or leaving the keys with the clerk of a landlord is not an acceptance. Cannan v. Hartley, 9 C. B. 634. Any possible inference that the receipt of keys is an acceptance of surrender may be rebutted by proof that the landlord told the tenant that he did not accept the keys with that intention. Peter v. Kendal, 6 B. & C. 703; Walls v. Atcheson, 3 Bing. 462.

has expressly refused to accept a surrender, is not such an acceptance as will constitute a surrender.<sup>45</sup> Even where the landlord, after entering on the premises after the tenant has left, relets them for the remainder of the unexpired term it raises no presumption that he has accepted a surrender as his conduct in entering is for the mutual benefit of both parties to the lease and inures to the advantage of the tenant whose liability for rent is thus diminished. So, from this it follows that the receipt of keys by the lessor in pursuance of an agreement by him with the lessee that he would lease the premises on account of the lessee and at his risk but upon condition that this agreement was not to alter the relations or obligations of the parties is not the acceptance of a surrender.<sup>46</sup> There must be some action or language on the part of the landlord when the keys are delivered to him from which his acceptance of the symbolical surrender may be implied. His action in picking up a bunch of keys which had been left upon the doorstep of his residence by the lessee, so that they would not be lost, is not such a receipt of the keys as will bind him to a surrender.<sup>47</sup> So where the tenant after paying rent up to the date of the abandonment sent a messenger with the keys to the landlord who on his refusing to receive them, left them on his desk and the landlord afterwards let the premises and credited the tenant with what he received in the way of rent from the new tenant there was no surrender. The whole effect of the conduct of the landlord in receiving the keys and reletting was nullified in this case by his having told the tenant prior to the receipt of the keys that he would not release him from the rent and that, if he left the premises before the term expired he would relet them for his benefit.<sup>48</sup> By a few of the courts it has been held that the receipt of the keys by

<sup>45</sup> *Landt v. Schneider*, 31 Mont. 15, 77 Pac. Rep. 307, 308.

<sup>46</sup> *Morgan v. Smith*, 70 N. Y. 537, 546. In *Lafferty v. Hawes*, 63 Minn. 13, 65 N. W. Rep. 87, the landlord received the keys from the tenant, took possession, placed theatrical posters on the windows and told his former tenants to remove their advertising signs from the prem-

ises. It was held that he had accepted the surrender. See also, *Buckingham Apartment House Co. v. Dafoe*, 78 Minn. 268, 80 N. W. Rep. 974.

<sup>47</sup> *Diehl v. Lee*, (Pa. 1887.) 9 Atl. Rep. 865.

<sup>48</sup> *Underhill v. Collins*, 132 N. Y. 269, 30 N. E. Rep. 576, affirming 57 Hun, 590, 10 N. Y. Supp; *Cannan v. Hartley*, 9 M. G. & S. 635.

the landlord will alone, at least in the absence of acts showing a contrary intention raise a presumption that the landlord has accepted the surrender.<sup>49</sup> The presumption, if any there be, is wholly a presumption of fact depending upon the particular circumstances of each case. The delivery of the keys under any circumstances is only relevant as indicative of an intention on the part of the landlord to resume the possession, and, if that intention is shown not to have been in the mind of the landlord when he received the keys, the delivery of the keys must be disregarded altogether. In many cases the acceptance of the keys by the landlord in connection with other facts has been held to constitute an acceptance of a surrender by the tenant.<sup>50</sup>

<sup>49</sup> Hayes v. Goldman, 71 Ark. 251, 72 S. W. Rep. 563; Terstegge v. First German Mu. Benefit Society, 95 Ind. 82, 87, 47 Am. Dec. 135; Ketcham v. Ochs, 70 N. Y. Supp. 268; Whitehead v. Clifford, 5 Taunt. 518, 15 R. R. 579; Dodd v. Acklom, 6 Man. & G. 672, 7 Scott (N. R.) 415, 13 L. J. C. P. 11; 7 Jur. 1017.

<sup>50</sup> Channel v. Merrifield, 206 Ill. 279, 280, 69 N. E. Rep. 32, reversing 106 Ill. App. 243; Joslin v. McLean, 99 Mich. 480, 58 N. W. Rep. 467; Scott v. Beecher, 91 Mich. 590, 52 N. W. Rep. 20; Nelson v. Thompson, 23 Minn. 508; Lafferty v. Hawes, 63 Minn. 13, 65 N. W. Rep. 87; Huling v. Roll, 43 Mo. App. 234, 241; Blake v. Dick, 15 Mont. 236, 38 Pac. Rep. 1072; Hegeman v. McArthur, 1 E. D. Smith (N. Y.) 147; Townsend v. Albers, 3 E. D. Smith, (N. Y.) 560; Spies v. Voss, 16 Daly 171, 9 N. Y. Supp. 532; Frost v. Akron Iron Co., 1 App. Div. 449; 37 N. Y. Supp. 374, 72 N. Y. St. Rep. 478; see also 12 Misc. Rep. 348, 33 N. Y. Supp. 654, 2 Ann. Cases, 23. The delivery of the key of a store by the tenant, he thereafter

continuing in possession thereof, does not constitute a surrender of lofts or floors above the store to which access is had by a separate entrance in no way connected with the door itself the keys of which are not turned over to the landlord. Hermann v. Curiel, 3 App. Div. 511, 38 N. Y. Supp. 343. "As we have seen, he refused to accept a surrender of the premises at the interview he had with the defendant. He then told him that he should hold him for the rent; that if he left the premises he would rent them for and on his account. It was under these circumstances that the defendant left the premises and sent the keys by another person to the plaintiff. The plaintiff in reletting the premises, did only that which he had promised and had the right to do. He could have left the premises vacant during the unexpired term of the lease and required the tenant to pay the rent as it matured. The reletting of the premises for the benefit of the tenant relieves him in part of the burden that he otherwise would have had to bear.

**§ 711. The surrender of a portion of the premises.** The parties to the lease may by mutual consent evidenced by their express words or conduct make a surrender of a part of the demised premises. Thus, for example if the tenant permits the landlord to enter and build upon a portion of the land occupied by him while retaining the balance it is a surrender of that portion of the premises upon which the owner has entered and built.<sup>51</sup> The tenant is no longer liable to pay rent for the portion of the premises which he has surrendered if the loss of that portion materially impaired the value of the use of the whole premises to him. If, however, the landlord can show that the value of the premises to the tenant is not impaired by the surrender of a portion of it he may recover the entire rent reserved in the lease notwithstanding the partial surrender.<sup>52</sup> There may also be a surrender of a portion of the premises by express agreement in writing or by implication and operation of law to be inferred from the conduct of the parties which would amount to a surrender of the whole premises. But the mere surrender of a small portion of the premises with a proportionate reduction of the rent does not alone itself amount to a surrender by operation of law or the creation of a new tenancy.<sup>53</sup> Finally it may be said that where there has been a surrender and an acceptance of a portion of the premises only the courts in apportioning the rent will take into consideration the actual rental value of the portion retained by the tenant as compared with the whole premises rather than its relative size or area.

**§ 712. The acceptance of an assignee of the lessee as a new tenant.** Whether the conduct of a landlord in connection with an assignment of the lease by the tenant does or does not amount to the acceptance of a surrender of the tenant depends wholly upon the intention present in such conduct. The mere acceptance of the rent from an assignee after the assignment is

He is, therefore, a gainer rather than a loser by reason of such reletting. It may be said that such a reletting would operate as an acceptance of a surrender of the premises unless there is an agreement, express or implied, that such reletting may be made." By

the Court by Haight, J. in Underhill v. Collins, 132 N. Y. 269, 272.

<sup>51</sup> Smith v. Pendergast, 26 Minn. 318, 3 N. W. Rep. 978.

<sup>52</sup> Smith v. Pendergast, 26 Minn. 318, 322, 3 N. W. Rep. 978.

<sup>53</sup> Holme v. Brunskill, 47 L. J. Q. B. 610, 3 Q. B. D. 495, 38 L. T 838.

never sufficient alone to raise an implication that the landlord has accepted him as a new tenant.<sup>54</sup> The intention to accept a surrender will not be implied from proof that a tenant who was bound on his covenant to pay rent has placed his assignee in possession of the premises and that the landlord has collected rent from such person. There must be something more than this to raise a presumption of an intention on the part of the landlord that there shall be a surrender. The execution of a new lease by the landlord to the assignee would constitute the acceptance of a surrender and would, without doubt, release the assignor from his obligation on his covenant. But the intention of the parties is always controlling.<sup>55</sup> The intention on the part of the landlord to accept a surrender in a case where a lease has been assigned and the assignee has entered is wholly dependent on the circumstances of each particular case. An oral lease entered into by the landlord with the assignee with or without the receipt of rent from him may operate as a valid surrender of a lease in writing if it is apparent that such was the intention of the landlord.<sup>56</sup> The cancellation of a lease by the lessor after an assignment of the term by the lessee and the execution of a new one to the assignee are a full and complete surrender of the existing lease. The assignor ceases to be liable on its covenants.<sup>57</sup> For it is a general rule that an execution of a new lease by the landlord and the assignee raises a conclusive presumption that the landlord has accepted a surrender from his former tenant. But the relation of landlord and tenant created by a lease is not terminated merely by the assignment of the term by the lessee to the lessor, though accompanied by an instrument executed by the lessor releasing the lessee and cancelling the lease where the lessee remains in possession. There must be an actual delivery of the premises to the lessor to constitute such a transaction a surrender.<sup>58</sup> The forma-

<sup>54</sup> Jones v. Barnes, 45 Mo. App. 590; Rees v. Lowry, 57 Minn. 381, 59 N. W. Rep. 310; House v. Burr, 24 Barb. (N. Y.) 525; Wallace v. Dinning, 11 Misc. Rep. 317, 32 N. Y. Supp, 159, affirming 10 Misc. Rep. 47, 30 N. Y. Supp. 830.

<sup>55</sup> Thomas v. Cook, 2 B. & Ald. 119; Millis v. Auriol, 1 Smith's Case, L. C. 39, 4 T. R. 94; 1 H. Bl. 433.

<sup>56</sup> Logan v. Anderson, 2 Doug. (Mich.) 101; Lovering v. Langley, 8 Minn. 107.

<sup>57</sup> Morgan v. McCollister, 11 Ala. 319, 20 So. Rep. 54; Colton v. Graham, 72 Iowa, 324, 33 N. W. Rep. 76.

<sup>58</sup> Kower v. Cluck, 33 Cal. 401, 406.

tion of a corporation which included one of a firm who was a tenant, and the taking over of the assets of the firm by the corporation with an acceptance of rent by the landlord from the corporation may constitute a surrender if the court is satisfied the landlord accepted the corporation as a tenant.<sup>59</sup>

**§ 713. The effect of a re-letting by a landlord to a stranger.** Very many cases hold that a re-entry by the landlord and a reletting of the premises by him without the consent of the tenant, but accompanied by an abandonment by the tenant, will constitute a surrender by operation of law, particularly if the letting is by the landlord upon his own account.<sup>60</sup> In order that

<sup>59</sup> Golding v. Brennan, 183 Mass. 286, 67 N. E. Rep. 239.

<sup>60</sup> Rice v. Dudley, 65 Ala. 68; Welcome v. Hess, 90 Cal. 507, 27 Pac. Rep. 569, 25 Am. St. Rep. 145; Palmer v. Myers, 79 Ill. App. 409; Heordt v. Hanne, 91 Ill. App. 514; Williams v. Vanderbret, 145 Ill. 238, 34 N. E. Rep. 476, 477, 36 Am. St. Rep. 486, 21 L. R. A. 489; Donahoe v. Rich, 2 Ind. App. 540, 28 N. E. Rep. 1001, 1003; Colton v. Garnam, 72 Iowa, 324, 33 N. W. Rep. 76; Wiener v. Baldwin, 9 Kan. App. 772, 775, 59 Pac. Rep. 40; Day v. Watson, 8 Mich. 535; Drew v. Billings-Drew, 9 Det. Leg. N. 513, 92 N. W. Rep. 774; Bowen v. Haskell, 53 Minn. 480, 482, 55 N. W. Rep. 629; Levering v. Langley, 8 Minn. 107; Bowen v. Haskell, 53 Minn. 480, 55 N. W. Rep. 629; Koenig v. Miller Brothers Brewing Co., 38 Mo. App. 182; Huling v. Roll, 43 Mo. App. 234; Buck v. Lewis, 46 Mo. App. 227; Snyder v. Parker, 75 Mo. App. 529; Squire v. Ferd. Heim Brewing Co., 90 Mo. App. 462; Clemens v. Broomfield, 19 Mo. 118; Kerr v. Clark, 19 Mo. 132; Mathews v. Tobener, 39 Mo. 115; Hutchinson v. Jones, 79 Mo. 496; Wal-

lace v. Kennedy, 47 N. J. Law, 242; Cummings v. Adam, 4 N. J. J. 215; Smith v. Niver, 2 Barb. (N. Y.) 180; Whitney v. Myers, 8 N. Y. Super. Ct. Rep. 266; Underhill v. Collins, 132 N. Y. 271, 30 N. E. Rep. 576; Stern v. Murphy, 102 N. Y. Supp. 797; Gray v. Kaufman Dairy & Ice Cream Co., 162 N. Y. 388, 56 N. E. Rep. 903, 49 L. R. A. 580, 76 Am. St. Rep. 227; reversing 45 N. Y. Supp. 1141; Barkley v. McCue, 25 Misc. Rep. 738, 55 N. Y. Supp. 608; Gaffney v. Paul, 29 Misc. Rep. 642, 61 N. Y. Supp. 173, 95 N. Y. St. Rep. 173; Smith v. Wheeler, 8 Daly (N. Y.) 135, No. 121 Madison Ave. v. Osgood, 18 N. Y. Supp. 126, 19 N. Y. Supp. 911; Com. v. Conway, 1 Brewst (Pa.) 509; Pelton v. Place, 71 Vt. 430, 46 Atl. Rep. 63, 66; Witman v. Watry, 31 Wis. 638, 639; *Ex parte* Houghton, 12 Fed. Cases, 6,725, 1 Low 554; Nicholls v. Atherstone, 10 Q. B. 944, 16 L. J. Q. B. 371, 11 Jur. 778; Page v. Mann, 6 L. J. (O. S.) K. B. 63; Thomas v. Cook. 3 B. & Ald. 119, 2 Stark 408, 20 R. R. 374; Davison v. Gent, 1 H. & N. 744, 26 L. J. Ex. 122, 3

a new lease by the tenant to a third person shall operate as a surrender of the old lease, it must be valid and be binding as a lease upon both the lessor and the lessee. The acceptance of a new lease by the lessee does not operate as a surrender of the old lease, where the new lease is void or voidable.<sup>61</sup> Nor will the execution of an agreement for a new lease between the parties to a lease operate as a surrender of the old lease where the possession is postponed to the future.<sup>62</sup> The most approved, best considered cases, however, assert a contrary doctrine, holding that where a tenant repudiates his lease, and then abandons the possession and the landlord re-enters and re-lets the property to another, such re-letting does not relieve the tenant from the payment of rent under the covenant in the lease.<sup>63</sup> If the landlord shall elect to do so, he may, when his tenant has abandoned the possession of the premises, permit them to remain vacant, having first given his former tenant notice that he will do so. He is under no obligation during the term to procure a new tenant for the premises or

Jur. (N. S.) 342, 5 W. R. 229;  
Page v. Mann, 6 L. J. (O. S.) K  
B. 63.

<sup>61</sup> *Biddulph v. Poole*, 11 Q. B.  
713.

<sup>62</sup> *John v. Jenkins*, 1 Cr. & M.  
227; *Foquet v. Moore*, 7 Exch. 870;  
*Davison d. Bromley v. Stanley*, 4  
Burr. 2210; *Doe d. Berkeley v.  
York*, 6 East 86, 2 Smith 166, 8  
R. R. 413, *Ex parte Vitale, In re  
Young*, 47 L. T. 480; *McDonnell  
v. Pope*, 9 Hare 705, 16 Jur. 771.

<sup>63</sup> *Meyer v. Smith*, 33 Ark. 627;  
*Grommes v. St. Paul Trust Co.*, 147  
Ill. 634, 35 N. E. Rep. 820, 37 Am.  
St. Rep. 248, affirming 47 Ill. Rep.  
568; *Bardlet v. Walker*, 93 Ill.  
App. 609; *Biggs v. Stueler*, 93  
Md. 110; *Oldewurtel v. Wiesen-  
feld*, 97 Md. 165, 173, 54 Atl. Rep.  
969; *Briggs v. Dyer*, 7 Cush.  
(Mass.) 337; *Scott v. Beecher*, 91  
Mich. 590; 52 N. W. Rep. 20; *Al-  
sup v. Banks*, 68 Miss. 664; 9 So.  
Rep. 895, 13 L. R. A. 598; 24 Am.

St. Rep. 294; *Hartz v. Eddy*, 103  
N. W. Rep. 852, 12 Detroit Leg. N.  
251; *Winant v. Hines*, 14 Daly (N.  
Y.) 187; *Rich v. Doyenn*, 85 Hun.  
(N. Y.) 510, 33 N. Y. Supp. 341;  
*Bloomer v. Merrill*, 1 Daly (N. Y.)  
485; *Van Buskirk v. Gordon*, 10  
N. Y. St. Rep. 351; *Underhill v.  
Collins*, 132 N. Y. 269, 30 N. E.  
Rep. 576, affirming 57 Hun, 590,  
10 N. Y. Supp. 680; *Scheelky v.  
Koch*, 119 N. Car. 80, 25 S. E. Rep.  
713; *Martin v. Kepner*, 1 Ohio  
Dec. 57; *Kirland v. Wolf*, 3 Wkly.  
Law Bul. (Ohio) 114; *Crown Mfg.  
Co. v Gay*, 9 Ohio Dec. 420, 13  
Wkly. Law Bul. 188; *Regan v.  
Walsh*, 11 Ohio Dec. 611, 8 N. P.  
691; *Strong v. Schmidt*, 8 Ohio  
C. D. 551, 15 R. 233; *Auer v.  
Penn*, 99 Pa. St. 370, 44 Am. Rep.  
114; *Decker v. Hartshorn*, 60 N. J.  
Law 548, 38 Atl. Rep. 678; *Doston  
v. Sickel*, 66 N. J. Law, 492, 49  
Atl. Rep. 679.

to let the premises for the benefit of the tenant, who has, without reason or excuse, abandoned them.<sup>64</sup> Any efforts the landlord may make to procure a new tenant during the remainder of the term, are purely voluntary on his part, and they do not necessarily discharge the tenant from his covenant to pay rent, though the landlord may be successful in securing a new tenant.<sup>65</sup> For a landlord may without creating a surrender by operation of law re-enter upon the premises after the tenant has abandoned them, and he may lease to another after giving notice to the tenant of his intention to do so. If the landlord enters upon and relets the premises, not as a new lease but for and on account of the tenant and with the intention to continue to hold the tenant for the rent, it is no surrender.<sup>66</sup> Thus a tenant whom, after he has abandoned the premises, the landlord notifies he will lease the premises for the tenant's account, cannot subsequently refuse to pay the rent though he may legally claim that the rent which the new tenant pays shall be deducted from what he has agreed to pay.<sup>67</sup> So the mere attempt to rent premises after the tenant has abandoned

<sup>64</sup> *Respini v. Porta*, 89 Cal. 464, 26 Pac. Rep. 967, 23 Am. St. Rep. 488; *Patterson v. Emerick*, 21 Ind. App. 614, 52 N. E. Rep. 1012; *Merrill v. Willis*, 51 Neb. 162, 70 N. W. Rep. 914; *Bowen v. Clarke*, 22 Oreg. 566, 30 Pac. Rep. 430; *Gray v. Kaufman Dairy & Ice Cream Co.*, 9 App. Div. 115, 41 N. Y. Supp. 73, 75 N. Y. St. Rep. 533; *Clendenning v. Lindner*, 9 Misc. Rep. 582; 30 N. Y. Supp. 653; *Reich v. McCrea*, 59 Hun, 625, 13 N. Y. Supp. 650.

<sup>65</sup> *Spies v. Voss*, 16 Daly (N. Y.) 171, 9 N. Y. Supp. 532, 30 N. Y. St. Rep. 548; *Lopper v. Bouve*, 6 Pa. Super. Ct. Rep. 452, 41 W. N. C. 566; *Rack v. Anheuser-Busch Brewing Association*, 17 Tex. Civ. App. 167, 42 S. W. Rep. 77.

<sup>66</sup> *Brown v. Cairns*, 107 Iowa, 727, 737, 77 N. W. Rep. 478; *Stewart v. Sprague*, 71 Mich. 50, 38 N. W. Rep. 673; *Scott v. Beecher*, 91

Mich. 590, 52 N. W. Rep. 20; *Meyer v. Smith*, 33 Ark. 627; *Auer v. Penn.*, 99 Pa. St. 375, 44 Am. Rep. 114; *Langsdorf v. Le Gardeur*, 27 La. Ann. 364; *Morgan v. Smith*, 70 N. Y. 537.

<sup>67</sup> *Alsup v. Banks*, 68 Miss. 664, 9 So. Rep. 895, 24 Am. St. Rep. 294, 13 L. R. A. 598. "He could have left the premises vacant during the unexpired term of the lease and required the tenant to pay the rent as it matured. The reletting of the premises for the benefit of the tenant relieves him in part of the burden that he otherwise would have had to bear. He is therefore a gainer rather than a loser, by reason of such reletting. It may be true that such reletting would operate as an acceptance of a surrender of the premises, unless there is an agreement, express or implied, that such reletting may be made."

them is according to some of the cases in no wise material to show that the landlord has accepted a surrender. Thus it is said the landlord may re-enter the premises, having accepted the keys for that purpose, put up a to-let sign on them<sup>68</sup> and otherwise attempt to re-let them and this will be no evidence of the acceptance of a surrender if the landlord informs the tenant that he is going to re-let the premises on his account and that he intends still to hold him liable upon the covenant to pay rent.<sup>69</sup> This the landlord in theory at least is presumed to do for the benefit of the tenant for unquestionably the landlord has the right to let the premises remain vacant. Thus, in a case where the tenant writes to the landlord through his agent, at the same time sending the keys and telling him he has no further use for the demised premises, and the agent answers that he will hold the keys subject to the tenant's order, the action of the agent in attempting subsequently to let the premises will not prevent the landlord from recovering the rent for the full term.<sup>70</sup> A tenant, whose landlord, on the abandonment of the premises by the tenant, relets them for the benefit of the latter at a greater rental than would have been paid by the tenant had he continued in possession, cannot, in an action by the landlord to recover the rent accruing before the abandonment, counterclaim the excess received against what he owes on his own lease.<sup>71</sup> The tenant who has abandoned the premises cannot complain that the landlord has relet them, as this is for his benefit. Nor can he take advantage of a reletting by

By the court in *Underhill v. Collins*, 132 N. Y. 271, 30 N. E. Rep. 576, 577.

<sup>68</sup> *Redpath v. Roberts*, 3 Esp. 225.

<sup>69</sup> *Auer v. Penn.* 99 Pa. St. 370; *Marseilles v. Kerr*, 6 Whart. (Pa.) 500.

<sup>70</sup> *West Side Auction-House Co. v. Connecticut Mut. Ins. Co.*, 85 Ill. App. 497; judgment affirmed 186 Ill. 156; 57 N. E. Rep., 839. In construing a provision that lessors might on breach of any covenant in the lease re-enter and "at their discretion, relet the

premises, at the risk of the lessee, who shall remain, for the residue of said term, responsible for the rent herein reserved, and shall be credited with such amounts only as shall be, by the lessors, actually realized," the United States Supreme Court held that rent cannot be recovered by the lessor after a reentry unless a reasonable effort has been made to let the premises. *International Trust Co. v. Weeks*, 203 U. S. 364, 27 Sup. Ct. 69, affirming 139 Fed. Rep. 5. <sup>71</sup> *Richardson v. Gordon*, 188 Mass. 279, 74 N. W. R. 344.

claiming that it constitutes a surrender as it is a purely voluntary act by the landlord which will not benefit the landlord, but may benefit the tenant. The act of the landlord in reletting the premises on account of the tenant imposes upon the landlord no other penalty other than that of crediting the tenant on his rent with the sum so earned by the premises during the term.<sup>72</sup> In other words, under such circumstances, the outgoing tenant is liable for the difference between the amount of rent he has covenanted to pay and the amount actually received by the landlord from the new tenant where<sup>73</sup> the premises are rented at a lower rent. The conversations and communications passing between the parties at, or subsequent to, the abandonment of the premises by the tenant and the reletting by the landlord are always very important and material; and frequently conclusive if they clearly show the intention. Though the action of the landlord in reletting may be purely voluntary on his part his language to the tenant in connection with it may show conclusively that he meant it to be an acceptance of a surrender. If, for example, the landlord tells the tenant that if he abandons the premises he will relet them on his account and hold him for any default in rent, it may be conclusively presumed that the landlord did not intend that the reletting should be an acceptance. If the landlord merely tells the tenant he will relet the premises it is open for conjecture whether or not he means that the reletting shall be an acceptance. The same conjecture may exist when before the abandonment he tells the tenant he means to hold him for the rent and subsequently relets the premises in his own name. A distinction in the effect which will be given to the declarations and statements of the landlord to the tenant is also recognized between those which are oral and those which are in writing. Thus, if the landlord on being given the keys shall write the tenant that he refuses to accept a surrender, the neglect of the tenant to answer his letter will not be conclusive upon the tenant as an assent by acquiescence in the expressed intention of the landlord. But, on the other hand, if in a personal interview the landlord expressly warns the tenant that he is still

<sup>72</sup> Dolton v. Sickel, 66 N. J. Law 492, 49 Atl. Rep. 679; Marshall v. John Grosse Clothing Co., 184 Ill. 421, 56 N. E. Rep. 807; affirming 83 Ill. App. 338.

<sup>73</sup> Auer v. Penn., 99 Pa. St. 370, 44 Am. Rep. 114; Randall v. Thompson, 1 White & W. Civ. Cas. (Tex.) Ct. App. §1102.

bound by the lease and the tenant is silent, an implied obligation is created upon the ground that a man is bound at once to contradict such a statement orally made, though he may not be obliged to enter into a written correspondence in reference to the reletting.<sup>74</sup>

**§ 714. A surrender by or to an agent of the landlord, or the tenant.** The general rules and principles of the law of agency apply to a surrender which is alleged to have been made to an agent of the landlord or by an agent of the tenant. In the first place in order that a surrender made to or by an agent shall be valid or binding on his principal, the authority of an agent to surrender a lease, must be clear, and cannot be presumed.<sup>75</sup> It must appear either that he was a general agent, or, if he was a special agent, that he had power and authority from his principal to make or accept a surrender. Or if neither of these facts are proved, then it must be shown that the surrender was ratified by the principal. A surrender of leased premises by the tenant to an agent of the lessor who has power to receive the surrender as soon as it is accepted by the agent is equivalent to a surrender to the lessor in person.<sup>76</sup> Where the tenant has been dealing with a real estate broker, who has had charge of renting the property, and has authority to accept a surrender, the tenant may make the surrender to a person in charge of the agent or broker's office.<sup>77</sup> As above stated it must appear that the agent was especially authorized to make or receive a surrender or that he was a general agent, and that the surrender was within the scope of his authority. An agent who is authorized only to collect rents for the landlord has usually no authority to accept a surrender of the premises without the express direction of the landlord.<sup>78</sup> And where a statute permits a surrender of a lease in writing to be made by an agent of

<sup>74</sup> *Gray v. Kaufman Dairy & Ice Cream Co.*, 162 N. Y. 388, 56 N. E. Rep. 903; *Learned v. Tillotson*, 97 N. Y. 12.

<sup>75</sup> *Lovejoy v. McCarty*, 94 Wis. 341, 68 N. W. Rep. 1003.

<sup>76</sup> *Hart v. Pratt*, 19 Wash. 560, 53 Pac. Rep. 711, 714; *De Morat v. Falkenhagen*, 148 Pa. St. 393, 394, 30 W. N. C. 39, 23 Atl. Rep. 1125; *Adams v. City of Cohoes*, 53

Hun, 260, 6 N. Y. Supp. 617, 618; *Buckingham Apartment House Co. v. Dafoe*, 78 Minn. 268, 80 N. W. Rep. 974.

<sup>77</sup> *Frost v. Akron Iron Company*, 37 N. Y. Supp. 374, 380, 1 App. Div. 449; compare *Arras v. Richardson*, 5 N. Y. Supp. 755.

<sup>78</sup> *Tolle v. Orth*, 75 Ind. 298; *Woodward v. Lindley*, 43 Ind. 333.

the tenant authorized in writing to do so, such agent must be especially authorized in writing to make the surrender.<sup>79</sup> The agent of a landlord who has special or general authority from his principal to modify or cancel a lease made by him for the latter without consulting the landlord may accept a parol surrender of a written lease. He may waive a stipulation in the lease that the acceptance of a surrender shall be written.<sup>80</sup> Generally speaking a janitor or caretaker of a house let in apartments has no implied authority from the general scope of his employment to accept a surrender. His duties are limited to the care and protection of the property coupled with the promotion of the convenience of the tenants, but aside from this there is usually no implication either that he has authority to collect rents, or to accept a surrender. A surrender of apartments to a janitor may be ratified by the conduct of the landlord when the fact is brought to his knowledge. A surrender by a tenant in pursuance of a notice to quit by the landlord is not established by proving a delivery of the key to the janitor unless either it be shown he had authority from the landlord to accept a surrender or that the landlord was apprized of a surrender to the janitor under the notice and ratified it by entering upon possession. So also some act on the part of the tenant must be shown by which it may be directly established or from which it may be inferred that the tenant in delivering the key was acting under the notice to quit.<sup>81</sup> There is no surrender implied from the delivery of the keys of the premises by a lessee to a janitor who had no authority to accept them where the lessee had an undertenant who is not shown to have also surrendered possession, and it appearing that neither the lessor nor his agent knew the premises were vacant or that the keys had been delivered.<sup>82</sup>

**§ 715. A surrender by the tenant becoming a vendee.** The execution of a contract of sale by the parties to the lease by which the landlord agrees to sell and the tenant agrees to purchase, the tenant to receive a deed in the future, and in the mean-

<sup>79</sup> *Ramsay v. Wilkie*, 13 N. Y. Supp. 554.

<sup>82</sup> *Morris v. Dayton*, 84 N. Y.

Supp. 392; on the question of a

<sup>80</sup> *Goldsmith v. Schroeder*, 93 App. Div. 206, 87 N. Y. Supp. 558, 561.

surrender to a janitor, see also *Krumdieck v. Ebbs*, 84 N. Y. Supp. 825; *Gaines v. McAdam*, 79 Ill. App. 201.

<sup>81</sup> *Morris v. Dayton*, 86 N. Y. Supp. 172, 173.

time remaining in possession of the premises, is a surrender of the term in the absence of an express agreement to the contrary. As soon as the agreement of sale and purchase is executed, the relation between the parties to the lease becomes that of vendor and vendee, and the possession of the tenant at once becomes the possession of a vendee. The rights of the parties as against each other under the lease are extinguished.<sup>83</sup> This is particularly the case where the landlord's conduct is such after the execution of the contract of sale that it may fairly be inferred that a surrender has taken place, as, for example, where he has neither demanded nor received rent after the execution of the contract.<sup>84</sup>

**§ 716. Payment to be made by the landlord on a surrender.** Where the lease provides that upon the surrender of the premises by the lessee on a demand therefor being made by the lessor the latter shall pay a specified sum of money to the lessee, the surrender of the premises is a condition precedent to the enforcement of a right of action for the sum claimed by the lessee. So, where the lessor demands the surrender upon a day named, the premises must be surrendered on that day and a surrender by the tenant which is made on another day though before the expiration of the lease is not a sufficient performance of the condition precedent.<sup>85</sup> A provision in the lease binding on the landlord that, in the event of a sale of the property by him he would give the tenant a certain notice and also pay him a sum specified in the lease to surrender the premises means not that notice of the sale was required to be given the tenant, but a notice to surrender. The money was only to be paid on a sale which necessitated a surrender as compensation for the surrender and loss of the term and not in the event of a sale to a purchaser who would accept the tenant. The object of the clause was to enable the landlord to sell unimcumbered of the rights of tenants and the option to pay or not was in the lessor according to whether he should or should not sell to a person who would take the premises with the tenant in them and continue him in the possession<sup>86</sup> after the transfer of the reversion.

<sup>83</sup> *Dennison's Ex'vs v. Wertz*, 7 S. & R. (Pa.) 372.      Supp. 210, 35 Misc. Rep. 30 reversing 68 N. Y. Supp. 1131, 34 Misc. Rep. 218.

<sup>84</sup> *Lewis v. Angermiller*, 89 Hun, 65, 35 N. Y. Supp. 69.      <sup>85</sup> *Foley v. Constantino*, 43 Misc. Rep. 92, 93, 86 N. Y. Supp. 780.

<sup>86</sup> *Dierig v. Callahan*, 70 N. Y.

**§ 717. A new lease made with undertenants.** After the original lessee has abandoned the premises the lessor may, by accepting the undertenants of the outgoing lessee as his lessees, accept the surrender. If the lessor finds undertenants in possession after the abandonment his silence as to his intentions in respect to them will not alone raise any presumption that he has accepted the abandonment of the original tenant as a surrender. Nor will his receipt of rent from such undertenants after an abandonment by the original lessee alone and without any other evidence of his intention raise a presumption of assent on the part of the lessor to the surrender.<sup>87</sup> If the landlord takes rent from the undertenant it is safest for him to notify his immediate lessee that he receives the rent from the undertenant merely as an agent of the immediate lessee and that he means to continue to hold the latter responsible for the rent for the balance of the term. In order that the continuance in possession of undertenants by the original lessor shall constitute an acceptance of a surrender the immediate lessee must prove to the reasonable satisfaction of the jury that the original lessor made a new lease with them and that his language or conduct towards them was such that it may reasonably be presumed that the relation of landlord and tenant has been created between them.

**§ 718. The possession of the premises in the lessee is necessary for a valid surrender.** Where the term is created to begin immediately, the lessee cannot before his entry make a technical surrender for the reason that until the entry of the lessee there is no term and no reversion and consequently there is nothing to surrender. If, however, the lessee enters upon the premises and, being in possession, then assigns his term the assignee may before he has entered surrender the term because by the prior entry of his assignor a term and a reversion have been created. The possession under the lease thereby created is assigned and though the assignee be not yet in actual possession he may surrender the term by reason of the continued possession of his assignor.<sup>88</sup> The surrender of a lease to begin *in futuro* may be made by the lessee at any time before he enters into possession.<sup>89</sup>

<sup>87</sup> Decker v. Hartshorn, 60 N. J. Bacon v. Brown, 9 Conn. 334; Law 548, 38 Atl. Rep. 678, 680; Copeland v. Watts, 1 Starkie 95.

<sup>88</sup> Bacon's Abrx. tit. Leases S. 2.

So, too, in reference to leases to begin *in futuro* it may be said that such interests may usually be surrendered by operation of law,<sup>90</sup> as well as by an express agreement in writing.

**§ 719. The assent of the lessor to the surrender.** The actions of the parties in order to constitute a valid surrender during the term by operation of law, must be voluntary on the part of both and mutually satisfactory.<sup>91</sup> A mere abandonment of the premises during the term without an acceptance by the lessor or his assent thereto, is no defense to an action on a covenant to pay rent as it is not a surrender. It is not a surrender unless it shall be shown to have been accepted by the landlord as a surrender.<sup>92</sup> For the tenant cannot surrender the term before its expiration by efflux of time so as thereby to release himself from the payment of subsequently accruing rent without the actual or implied assent of his landlord.<sup>93</sup> From this it follows that where the tenant is sued for rent he cannot offer in evidence acts on his part which indicate or seem to indicate a surrender of the lease without connecting such acts with reciprocal conduct by the landlord or at least acquiescence therein on the part of the landlord.<sup>94</sup> And the burden of proof to show that the landlord has

<sup>90</sup> Shep. Touch. 302.

<sup>91</sup> Shep. Touch. 304; Ives v. Sams. Cro. Eliz. 521; Hutchins v. Martin, Cro. Eliz. 605.

<sup>92</sup> Wray-Austin Machinery Co. v. Flower, 12 Detroit Leg. N. 214, 103 N. W. Rep. 873.

<sup>93</sup> Crommelin v. Thiess, 31 Ala. 412, 70 Am. Dec. 499; Bonetti v. Treat, 91 Cal. 223, 27 Pac. Rep. 612, 14 L. R. A. 151; Lockwood v. Lockwood, 22 Conn. 425; Dunning v. Mauzy, 49 Ill. 368; Stobie v. Dills, 62 Ill. 432; Alschuler v. Schiff, 59 Ill. App. 51; Packer v. Cockayne, 3 G. Greene (Iowa) 111; Christy v. Casanave, 2 Mart. (N. S.) 451; Reynolds v. Swain, 13 La. 193; Roumage v. Blatrier, 11 Rob. (La.) 101; Rollins v. Moody, 72 Me. 135; Adreon v. Hawkins, 4 Har. & J. (Md.) 319; Fryska v. Prybeski, 11 Det. Leg.

N. 223, 102 N. W. Rep. 977; Stevens v. Pantlind, 87 Mich. 476, 49 N. W. Rep. 602; Stewart v. Sprague, 71 Mich. 57, 50, 38 N. W. Rep. 673; Churchill v. Lammers, 60 Mo. App. 244; Prentiss v. Warne, 10 Mo. 601; Quinette v. Carpenter, 50 Mo. 502; Kendall v. Hill, 64 N. H. 553, 15 Atl. Rep. 124; Felker v. Richardson, 67 N. H. 509, 32 Atl. Rep. 830; Peck v. Knickerbocker Ice Co., 18 Hun. 183; Teller v. Boyle, 132 Pa. St. 56, 58, 18 Atl. Rep. 1069; Shand v. McCloskey, 27 Pa. Super. Ct. Rep. 260; Smucker v. Grinberg, 27 Pa. Super. Ct. Rep. 531; Barlon v. Wainwright, 22 Vt. 88, 53 Am. Dec. 79.

<sup>94</sup> Weiner v. Baldwin, 9 Kan. App. 772, 59 Pac. Rep. 40.

<sup>95</sup> Kastner v. Campbell, (Ariz. 1897.) 53 Pac. Rep. 586.

accepted the surrender is always upon the lessee<sup>95</sup> where he alleges a surrender of the lease. The landlord of a tenant who abandons the premises before the expiration of the term may elect whether he will accept the abandonment as a surrender or not. He may permit the premises to remain vacant and recover the rent, or he may enter and determine the contract in which latter event he can recover only for rent actually due at the date of the acceptance.<sup>96</sup> For generally a mutual agreement between the lessor and the lessee that the lease shall be terminated must be shown to constitute a surrender whether express or implied. It is absolutely essential that it shall be clearly proved that the lessee or his agent assented to the termination of the lease and that the lessor and the lessee mutually agreed to a surrender of the term.<sup>97</sup> These rules are confined in their operation to cases where the tenant abandons the premises before the term comes to an end under the clauses of the lease. The necessity for the actual acceptance of a surrender by the landlord does not apply to abandonment of the premises by the tenant at the end of the term. Then any act on the part of the tenant clearly indicating that he has finally vacated the premises is a surrender without proof of an acceptance by the landlord.<sup>98</sup>

**§ 720. The tenant in possession after a delivery of the keys.** The occupancy of the premises by the tenant after he has delivered the keys to the landlord or to his agent is always a strong circumstance to show that, by the delivery of the keys, a surrender was not contemplated by the parties. The handing over of the keys of premises is at most only a symbolical delivery of possession which by a legal fiction is permitted to take the place of an actual delivery of possession under circumstances where it would work a manifest injustice to the tenant to require him to show an actual delivery of the possession to the landlord. By the delivery of the keys the landlord is presumed to be in-

<sup>95</sup> Gardiner v. Bair, 10 Pa. Super. Ct. Rep. 74, 44 W. N. C. 83; Churchill v. Lammers, 1 Mo. App. Rep. 155; Lucy v. Wilkins, 33 Minn. 441, 23 N. W. Rep. 861.

<sup>96</sup> Schuisler v. Ames, 16 Ala. 73, 50 Am. Dec. 168. A tenant at will is liable only for the value

of his actual occupation where he has not agreed to pay rent. Crommelin v. Thiess, 31 Ala. 412, 70 Am. Dec. 499.

<sup>97</sup> Stewart v. Sprague, 71 Mich. 50, 57, 38 N. W. Rep. 673.

<sup>98</sup> Mitchell v. Blossom, 24 Mo. App. 48

vested with the possession because by such delivery the power is placed in his hands to take actual possession without recourse to force in entering upon the premises, or without recourse to legal process. And also because by such a delivery the tenant has divested himself of power to enter upon the premises or to make such an exclusive use of the same for his own purposes as was contemplated by the parties at the time of executing the lease. By the delivery of the keys the tenant says in effect "I no longer have or desire to have the exclusive possession, occupation or enjoyment of the premises, but on the other hand intend that they shall pass to and continue in you to the same extent that you enjoyed and were vested with them prior to my entry under the lease." But actions speak louder than words so that if after the delivery of the keys the tenant still remains in possession to such an extent as renders it impossible for the landlord to regain possession the mere delivery of the keys is a nullity for the intention implied in such delivery is rebutted by the very clear inference of a contrary intention on the part of the tenant in remaining. But the mere leaving upon the premises by the tenant of some fixtures and some personal property of no value after he has abandoned the premises and delivered the keys to the landlord will not alone be sufficient to show that the delivery and acceptance of the keys was not a surrender.<sup>99</sup>

**§ 721. A surrender made by joint lessees.** One of several lessees who are tenants in common of the term cannot surrender the whole term. He may surrender his undivided share in the term but he cannot, either by express language or by his conduct divest his co-tenants of their estate in the term without their consent. But where several persons are jointly liable on a lease as lessees either may surrender the term to the landlord for each is the agent of all the others and may for them by language, conduct or silence bring about a surrender of the lease to the landlord.<sup>1</sup> So where there is a stipulation in a lease that it shall or

<sup>99</sup> Rorbach v. Crossett, 64 Hun, 637, 19 N. Y. Supp. 450; see, also, Byxbee v. Blake, 74 Conn. 607, 51 Atl. Rep. 535, 536; Haynes v. Aldrich, 133 N. Y. 287, 31 N. E. Rep. 94; Cavanaugh v. Clinch, 88 Ga. 610, 15 S. E. Rep. 673; Conway v. Carpenter, 30 N. Y. Supp.

315, 80 Hun, 428, affirmed 155 N. Y. 686, 50 N. E. Rep. 1116; Sowles v. Carr, 69 Vt. 414, 38 Atl. Rep. 77; Adler v. Mendelson, 74 Wis. 464, 43 N. W. Rep. 464.

<sup>1</sup> Hooks v. Farst, 165 Pa. St. 239, 247, 30 Atl. Rep. 846.

may be surrendered by the lessees on the happening of a certain contingency, one of two lessees who are partners in business is the agent of the other to make the surrender when the contingency happens.<sup>2</sup>

§ 722. To whom a surrender must be made. The person to whom a surrender is made must be competent to accept it. Inasmuch as a surrender, from a legal standpoint, is nothing more or less than a rescission of the contract of lease, the person who accepts the surrender must have mental capacity sufficient to know the character of his acts. In other words he must have sufficient mental capacity to make a valid contract. A surrender cannot be legally accepted by an infant, or a person *non compos mentis*. Where a landlord has been declared incompetent to manage his affairs a surrender must be made to and accepted by his committee or curator. A guardian may accept a surrender in the case of lands of his ward held under a lease. But in all such cases where the landlord is either an infant or an incompetent a surrender will not be implied from doubtful or equivocal conduct on the part of the curator or guardian. The court will examine into all the circumstances in order to ascertain whether or not the interests of the infant or incompetent will be benefited by a surrender. And a guardian or committee of an infant or incompetent person when a tenant attempts or requests that he will accept a surrender of a lease ought to apply to the court for direction, unless he is absolutely certain that for him to take a surrender will not render him personally liable. The person to whom the surrender is made must ordinarily have a greater and higher estate in the land than the person by whom it is made. This follows from the nature of things inasmuch as a lease is always a smaller estate than the estate owned by the person who has demised it whether the lessor be the owner of the fee or the tenant of a term for years. A surrender of a lease to be valid must be made to a person who in his own right is the owner of the reversion. It must be made to the landlord or his agent authorized to act for him in this par-

<sup>2</sup> Bergland v. Frawley, 72 Wis. 559, 563, 40 N. W. Rep. 372, holding also that this would not be the case in the absence of an express stipulation under the rule that one of two partners cannot

make a valid voluntary assignment of the firm's assets for the benefit of creditors without the concurrence of the other partner if the latter is reasonably accessible and can be consulted.

ticular respect.<sup>3</sup> If there be an intervening estate between the person who surrenders and the person to whom the surrender is made, it is not a valid surrender. Hence an undertenant cannot make a valid surrender of his lease to the original lessor which will release him from his obligations as an undertenant.<sup>4</sup> And not only must the person to whom the surrender is made have an estate larger than he who makes the surrender but he must possess the legal title in his own right. At the common law where a lease was made by a husband of the lands of his wife the surrender must be to the wife.<sup>5</sup> A surrender by a tenant who holds under a lease made by trustees made to the *cestui qui trust* is invalid and not binding on the trustees. So a surrender to an infant is void and not binding on the guardian. A surrender to one of several trustees or executors would probably be a valid surrender as to all. A surrender to one of two joint tenants who are the lessors is binding on both though one only of the two interfered in the management of the premises.<sup>6</sup> But a surrender to one of several tenants in common who have leased the premises owned by them as such would not bind the others unless subsequently ratified by them.

**§ 723. A surrender upon a condition.** A lease may be surrendered upon a condition subsequent and if this condition is never performed the term at once becomes revested in the lessee.<sup>7</sup> Hence, if a lessee for years surrender his term upon condition, he may, if the lessor shall fail to perform the condition, at once re-enter upon the premises and he is then in as of his original lease.<sup>8</sup> The fact that a lessee covenants in the lease to surrender the premises upon a certain contingency or condition does not give the lessor a right to enter and expel him unless there is a right to re-enter reserved in the lease.<sup>9</sup>

**§ 724. The consideration for an agreement in writing to surrender.** A mere agreement between the landlord and the tenant which is not based upon a valuable consideration, and

<sup>3</sup> *Cornish v. Searell*, 1 M. & Ry. 703, 8 B. & Cr. 471, 6 L. J. (O. S.) K. B. 254; *Baylis v. Prentice*, 75 N. Y. 604.

<sup>4</sup> *Springstein v. Schermerhorn*, 12 Johns (N. Y.) 357.

<sup>5</sup> *Woodward v. Lindley*, 43 Ind. 433.

<sup>6</sup> *Dodd v. Acklom*, 6 Man. & G. 673, 7 Scott (N. R.) 415, 13 L. J. C. P. 11.

<sup>7</sup> *Co. Litt. 218b.*

<sup>8</sup> *Lloyd v. Langford*, 2 Mod. 176.

<sup>9</sup> *Bergland v. Frawley*, 72 Wis. 559, 562, 40 N. W. Rep. 372.

which is not accompanied by an abandonment and acceptance of possession is void and unenforceable.<sup>10</sup> An executory contract by the parties to a lease that it shall be terminated and the possession restored to the landlord or his assignee must possess all the characteristics as to consideration and the meeting of the minds of the parties that are ordinarily required in the case of contracts generally. Express contracts to surrender leases which are valid only when the leases are in writing must themselves be in writing though this requirement is dispensed with when the contract to surrender has been executed by a reciprocal abandonment and acceptance.<sup>11</sup> An agreement in writing which is executed by both parties on a good consideration and manifesting an intention that it shall operate as a present surrender of the lease at once puts an end to the term and to the rights and obligations of the parties to the lease to one another. The tenant, if he continues in possession, does so merely as a tenant holding over and may be treated as such by the landlord. He cannot be sued for the rent thereafter accruing as under the lease nor can he sue his landlord on any covenant of the lease. He may under the general rule have a reasonable time to remove fixtures, but he must also vacate the premises within a reasonable period.<sup>12</sup> The fact that the written lease was not destroyed or physically surrendered to the landlord, or that the landlord does not at once re-enter, as he has a right to do, does not destroy the efficacy of the written instrument as a surrender.<sup>13</sup> The lease has been mutually and finally abandoned and cancelled and both parties are thereafter exempt from its covenants and if the lessee continues in possession and pays rent it will be conclusively presumed to be under a new lease, either expressly made, or implied from the circumstances of the case. So if the lessor has agreed to pay a sum of money or to do something which is the consideration on his part for the execution of the written surrender, the lessee may recover damages for the failure of the lessor to perform when he has properly performed all the conditions of the surrender on his part.<sup>14</sup>

<sup>10</sup> Wallace v. Patten, 12 Cl. & F. 491; affirming Patten v. Wallace, Longf. & T. 470; National Union Building Ass'n v. Brewer, 41 Ill. App. 233.

<sup>11</sup> Bogert v. Dean, 1 Daly (N. Y.) 259.

<sup>12</sup> Graves v. White, 87 N. Y. 465; Dubois v. Del. & Hud. Canal Co., 4 Wend. (N. Y.) 290; Harris v. Hiscock, 91 N. Y. 340, 345.

<sup>13</sup> Harris v. Hiscock, 91 N. Y. 340, 344.

<sup>14</sup> Bogert v. Dean, 1 Daly (N.

**§ 725. The merger of the term with the reversion.** If the tenant during the term acquires by purchase, descent, or otherwise the interest of the landlord in the reversion, there is a merger of the tenant's title into that of the landlord, and the term created by the lease is extinguished. The duties and obligations of the parties to one another are then at an end.<sup>15</sup> The landlord cannot thereafter recover rent subsequently accruing.<sup>16</sup> So, also, all rights which the former lessee had under his lease against his lessor, which have not accrued prior to the merger, are extinguished. Thus, a tenant cannot, after he has become an owner of the premises, recover damages occurring thereafter to the premises from the default of his former landlord to repair where the latter had covenanted to do so in the lease.<sup>17</sup> As illustrating the rule that a merger destroys the title of the landlord to collect rent subsequently accruing, it has been held that where several heirs leased land to a person to whom subsequently they sold the reversion, a doweress who was, with the heirs, a joint lessor, need not in an action brought by her for the rent, join the heirs as parties plaintiff, as, after the conveyance they would have no

Y.) 259. A stipulation in the lease that the lessees should surrender the premises to the lessor whenever he desired to make certain improvements on the premises is not a condition but a covenant. The entry on the premises by the lessor does not therefore determine the lease but the refusal of the lessee to surrender being a breach of covenant only, gives the lessor an action for damages. *Bergland v. Frawley*, 72 Wis. 559, 40 N. W. Rep. 372.

<sup>15</sup> *Otis v. McMillan*, 70 Ala. 46, 54; *Welsh v. Phillips*, 54 Ala. 309; *McMahan v. Jacoway*, 105 Ala. 585, 17 So. Rep. 39; *Carroll v. Ballance*, 26 Ill. 9, 20, 79 Am. Dec. 354; *Liebschutz v. Moore*, 70 Ind. 142, 146, 36 Am. Rep. 182; *Wahl v. Barroll*, 8 Gill. (Md.) 288; *Silvey v. Sumner*, 61 Mo. 253;

*Culverhouse v. Worts*, 32 Mo. App. 412; *Stevenson v. Hancock*, 72 Mo. 612; *Gunn v. Sinclair*, 52 Mo. 327; *Higgins v. Turner*, 61 Mo. 249; *Winfrey v. Work*, 75 Mo. 55; *Zey sing v. Wellbourn*, 4 Mo. App. 352, 354; *York v. Jones*, 2 N. H. 454, 456; *Lewis v. Angermiller*, 89 Hun, 65, 66, 35 N. Y. Supp. 69; *Logan v. Green*, 39 N. C. 370, 378; *Kershaw v. Supplee*, 1 Rawle (Pa.) 131; *Debozear v. Butler*, 2 Grant Cases (Pa.) 417; *Reed v. Munn*, 148 Fed. Rep. 737; *Pierce v. Brown*, 24 Vt. 165, 175, 2 Black. Comm. 177; *Salmon v. Swan*, Cro. Jac. 619; *Burton v. Barclay*, 7 Bing. 745; *Gage v. Acton*, 1 Salk. 326.

<sup>16</sup> *Martin v. Searcy*, 3 Stew. (Ala.) 50, 52.

<sup>17</sup> *McMahan v. Jacoway*, 105 Ala. 585, 17 So. Rep. 39.

interest in the rent subsequently accruing.<sup>18</sup> The purchase of the reversion by the tenant, does not, however, extinguish the right of the landlord to rents which have already accrued. In such cases there must be as between the landlord and the tenant an apportionment of rents as of the date of the delivery of the deed. If this cannot be done, and if the lessee after he becomes an owner, collects rents which became due before the sale and delivery of the deed, he must account to the lessor for the same, and the lessor may after the lessee has acquired title, sustain an action against him to recover rents which have accrued during the time he was in the occupation of the premises as a tenant.<sup>19</sup> As against third persons, as soon as the lease and the reversion are merged by the sale and conveyance of the reversion to the lessee by the lessor, the lessee became entitled to the reversion, and to every right which naturally attaches to it.<sup>20</sup> Thus, he may subsequently recover for a trespass committed upon it, or damages from having a portion of it taken for public purposes, or for a nuisance maintained near by, if it be shown that his right of action accrued after he had acquired title. Indeed, as a general proposition, a lessee who buys from his lessor has, after the merger of the title, precisely the same rights both as against his grantor, and as against other tenants in possession at the time of the merger, or against third parties as any other grantee of the premises. This is the rule in the absence of any express stipulation between the lessor and the lessee to the contrary. It is not material to the doctrine of merger that the term is longer in duration than the reversion.<sup>21</sup> Thus a term for one thousand years may as to a part thereof merge into an estate for life.<sup>22</sup> So if a lease for twenty-one years be granted by the owner of the fee and another lease be granted by the same landlord expectant thereon to another person for one year, and the second lessee shall assign his term to the first, there is a merger of the second term, though the earlier term is the longer. It was anciently said that under such circumstances, the first lease for twenty-one years was gone, and the second lease for

<sup>18</sup> Holmquist v. Bavarian State Brewing Co., 1 App. Div. 347, 37 N. Y. Supp. 380.

<sup>19</sup> Zeysing v. Welbourn, 4 Mo. App. 352.

<sup>20</sup> Story v. Uiman, 88 Md. 244, 41 Atl. Rep. 120.

<sup>21</sup> Hughes v. Robotham, Cro. Eliz. 302.

<sup>22</sup> White v. Greenish, 11 C. P. (N. S.) 209.

one year can begin to run, but this could only be true where the second lease for one year was expressly limited to begin on the termination of the first.<sup>23</sup> A conveyance of the reversion by the lessor to one of several lessees does not amount to a merger. The lease is not surrendered as between the lessor and the lessee to whom no conveyance is made, but is kept alive for his benefit, although his co-lessee has become his lessor. So, on the other hand, an assignment of the term or of a tenant's interest in the term, by one of several lessees to their lessor is not a merger for the interest of the lessee or lessees who have not assigned must be protected.<sup>24</sup> The principle at the basis of merger as regards the relationship of landlord and tenant is contained in the maxim *Nemo potest esse dominus et tenens*, which being freely translated means that no one can be a tenant of the premises of which he owns the fee. For, inasmuch as it takes at least two persons to make or to perform a lease or other contract, it is obvious that as soon as one person has withdrawn himself from an existing contractual relation the relation itself must be at an end. No one can at the same time be debtor and creditor of the same debt, or promisor and promisee of the same promise, or plaintiff and defendant in the same action. Nothing can be stated which is more obvious than this, and nothing can be more reasonable than to presume conclusively that as soon as the relationship of the contracting parties is at an end by the action of either of them, or by the operation of the law, that the obligations and rights growing out of such relationship are also at an end. For this arise the propriety and necessity for the doctrine of merger. The rule of merger is applicable to leases whenever the ownership of the fee and of the term unite in the tenant irrespective of the fact that the conveyance of the fee is made by one who was not the original lessor. If the lessor convey the fee to a third person and the latter subsequently sells and conveys it to the tenant, a merger at once takes place. So, where a guardian leased land belonging to his wards during their minority and they, on reaching their majority, sell and convey the land to the lessee a merger takes place.<sup>25</sup> The same result which is brought about by a purchase

<sup>23</sup> Burton Conv. 287; Stephen v. Bridges, 6 Madd. 66. <sup>24</sup> Mixon v. Coffield, 24 N. Car. 301, 304.

<sup>25</sup> Sperry v. Sperry, 8 N. H. 477, 480.

of the reversion by a tenant follows also when the term is acquired by the landlord. If the tenant for years conveys all his term and the title to his leasehold interest to the lessor the term is merged in the reversion and the lease is at an end.<sup>26</sup> An assignment by the lessee of his unexpired term to the lessor, if accepted by the lessor, constitutes a merger of the lease into the reversion, and neither party to the lease will thereafter be liable to the other on the covenants of the lease. The effect of the assignment is precisely that of an accepted surrender of the lease. If the lessee remains in possession thereafter though without a new lease he will be liable only for the reasonable value of the use and occupation of the premises. He can not be sued on the covenant of the lease to pay rent. In order that an assignment of a lease to the lessor shall have this effect it must be accepted by him. An assignment in the shape of an endorsement on the lease by the lessee written without the knowledge or consent of the lessor does not merge the lease though the lessee abandons the term and states he would not pay any more rent.<sup>27</sup> Where by statute the right of redemption secured to a debtor whose lands have been sold under execution or decree in foreclosure is neither property nor a right to property the purchaser at the sale is not prevented from conveying the property to a tenant living upon it under a lease prior to the mortgage. In case of such a sale and conveyance a merger takes place and the lease is extinguished by operation of law.<sup>28</sup> There is no merger where the circumstances of the case are such that a merger will work an injustice to a third person. Where a tenant assigns his lease to his landlord so that the term becomes merged in the fee simple and the landlord subsequently, being ignorant of the fact that the merger had taken place, creates a lease for all the residue of the term the merger will be disregarded to protect the new tenant. In laying down this rule the court

<sup>26</sup> Smiley v. Van Winkle, 6 Cal. 605; Shepard v. Spaulding, 4 Meto (Mass.) 416, 418; In Kower v. Gluck, 33 Cal. 401, it was held that the tenant on his conveying his term to his landlord must surrender possession or there will be no merger.

<sup>27</sup> Beattie v. Parrot Silver & Cop-

per Co., Mont. 320, 17 Pac. Rep. 451. An assignment of the lease by a tenant to his landlord as a security for debts which are to mature during the term is not a merger, Breese v. Bauge, 2 E. D. Smith (N. Y.) 474.

<sup>28</sup> Otis v. McMillan, 70 Ala. 46, 54.

construed the word "term," not only the interest of the tenant under the lease, but also the time which the lease had to run so that the words "residue of the term after a particular event means so many years as should be afterwards to come."<sup>29</sup>

**§ 726. The doctrine of merger is applicable only to concurrent estates.** The rule of merger, as applied to estates, is confined to those which are concurrent in duration or in point of time. If two or more concurrent estates, or estates which are running at the same time, meet and vest in the same person of necessity only one can continue to exist, and, consequently, a merger takes place because of the inconsistent and incompatible characters of the estates as regards one another. Hence as we have seen, if a tenant for years, purchase the reversion of the fee, or of a life estate or an estate for the life of another, the diverse interests in the land being antagonistic and being united in the same person, are merged because of the fact that the owner of both of them cannot stand in the relation of landlord to himself. But, a tenant for the life of another who takes a lease for a term of years to begin in possession when his estate for the life of the other shall cease, will be a tenant of the owner of the fee so long as the person on whose life his estate is limited shall live, being amenable to the reversioner during that tenancy, and upon the death of the *cestui que vie* he becomes a tenant for years and obligated to covenants of the lease. This rule follows from the fact that a person having two such estates in succession never can stand in the relationship of reversioner to himself which the law of merger is calculated to avoid. The making of a contract by the tenant to purchase the premises from his landlord does not alone merge the term with the reversion. The parties are still landlord and tenant and may enforce their mutual rights against each other at law until the title passes. But in equity the right of the landlord to distrain is suspended so long as the contract is unexecuted and remains valid. If the contract is released or abandoned by the tenant or, if he losses his right to a specific performance by unreasonable delay the right of the landlord to distrain is revived.<sup>30</sup>

<sup>29</sup> Cotttee v. Richardson, 7 Ex. 143, 21 L. J., Ex. 52.

<sup>30</sup> Ellis v. Wright, 76 L. T. 522.

**§ 727. When a merger does not take place.** A conveyance of the fee of the reversion by the landlord to the tenant will not be regarded in equity at least as a merger of the two estates where it will work an injury to the rights of third persons. For in equity the merger of estates is not favored, and the answer to the question whether two estates are merged depends not only upon the intention of the parties themselves, but upon all the facts and circumstances, and upon the question whether justice requires that there shall be a merger.<sup>31</sup> As between landlord and tenant, if before the landlord conveys, other persons have acquired liens upon his reversion, their rights will be protected in equity, and there will be no merger where a merger would result in loss of property rights by parties other than those directly interested.<sup>32</sup> Thus, where a lessee for a term took a future lease from his landlord for a term to commence in possession on the expiration of the existing term, and the landlord died during the first term devising his reversion to the lessee for his life, and the lessee during the first term assigned the life estate devised to him by his landlord to a third person, it was held that the second term was not merged in the life estate devised to the lessee, but that it was kept alive for the benefit of the assignee of the life estate.<sup>33</sup> There can be no merger unless the two estates which are alleged to be merged meet in the same person without any intervening estate.<sup>34</sup> For, if a merger is recognized or is conclusively presumed to have taken place where there is an intervening estate in another the intervening estate will also be extinguished to the damage and injury of its owner who may be an innocent purchaser for value.<sup>35</sup> Hence, where one becomes a part owner both

<sup>31</sup> Earle v. Washburn, 7 Allen (Mass.) 95, 97; Lewis v. Stake, 18 Miss. 20; Sheldon v. Edwards, 35 N. Y. 279.

<sup>32</sup> Buffum v. Deane, 4 Gray (Mass.) 385, 393.

<sup>33</sup> Rawlings v. Walker, 5 B. & Cr. 111. At law the rule as to merger is more inflexible than in equity, the latter having more regard for the intention of the parties and the injustice that might follow from permitting a merger. But at law the rule is that, where a

greater and a lesser estate coincide and meet in the same person and in the same right without any intermediate vested estate, the lesser is immediately annihilated, and said to be merged; Tolsma v. Adair, 32 Wash. 383, 73 Pac. Rep. 347.

<sup>34</sup> Johnson v. Johnson, 7 Allen (Mass.) 196; Simmons v. MacAdaras, 6 Mo. App. 297, 301.

<sup>35</sup> Logan v. Green, 39 N. Car. 370, 378.

of the reversion and of the leasehold the remainder of the reversion and of the term being owned by several other persons he cannot treat the lease and the fee as merged and maintain an action to partition the fee of the property, at the same time ignoring the leasehold estate which is vested in other persons.<sup>36</sup> A sale and transfer by the personal representative of a deceased tenant of unexpired leases held by the deceased to the landlord do not necessarily merge the terms. The landlord may still collect the rent which is due from the estate of the tenant. He may also interpose as a setoff or counterclaim the amount which is due to him for rent for the whole term in an action brought by the personal representative to recover the purchase money due from him on the leases.<sup>37</sup> The rule of merger is based on the impossibility of a person paying rent to himself and can have no application where from the very nature of the circumstances the liability for rent is recognized. Where a lessor who is a tenant for years grants to his subtenant the residue of his interest from the termination of the existing sublease the grant operates as an *interesse termini* and the sublease is not merged. A right of re-entry contained in the original lease will still exist and enable the lessor to re-enter.<sup>38</sup> Where several tenants in common as lessors reserve a right of way over the land demised, which is only a portion of the whole tract, and there is subsequently a partition had among them by which one of them takes the land demised, the reservation is at an end as regards those who take by the partition, the balance of the land. The right of way was reserved to the lessors in their capacity of owners of the reversion, and when the lessor to whom was set off the premises demised conveyed his interest to the lessee, the rights of the other lessors to easements in the land are extinguished.<sup>39</sup>

**§ 728. The resumption of the possession by a landlord as an acceptance of a surrender.** The mere going into possession of the premises by the landlord after the tenant has moved out before the expiration of the term is usually not an acceptance of the surrender. The intention of the landlord in re-entering

<sup>36</sup> Simmons v. McAdaras, 6 Mo. 121, 3 Ex. D. 72, 37 Let. 567, 23 App. 297, 303.

<sup>37</sup> Pate v. Oliver, 104 N. Car. 458, 10 S. E. Rep. 709.

<sup>38</sup> Dynevor v. Tremont, 57 L. J. Ch. 1078, 13 App. Cas. 279, 59 L.

<sup>39</sup> Hyde v. Warden, 47 L. J. Ex. T. 5, 37 W. R. 193.

and the motives with which this act were accompanied, are very material. There are a very few cases in which the motive of the landlord has not been much considered and an acceptance has been inferred from the mere entry into possession.<sup>40</sup> Of course, if a landlord, within a short time after the tenant has gone out, shall take possession of them without anything being brought home to the tenant to show that the intent of the landlord is to hold him for the rent, a slight presumption of an intention on the part of the landlord to accept the surrender may arise which is for the landlord to rebut by proof of facts and circumstances which will show a contrary intention.<sup>41</sup> But the implication of an acceptance of a surrender does not of necessity arise in every case of a resumption by the landlord of the possession after the tenant has abandoned the premises during the term. Other motives may have prompted the landlord not to consent to a rescission of the lease. He may have entered in order to repair the premises, or he may have entered to protect them against injury which might be done them by the elements and forces of nature or by the malicious and predatory instincts of wicked men. For it is a well known fact that a building of any sort and whether located in town or country, as soon as it becomes vacant, is a mark for the missile of every mischievous lad and the prey of every petty thief and tramp who may desire to avail himself of the loot and shelter which it furnishes. In the majority of cases the court will carefully look into all the acts and language of the parties to the lease by which the entry of the landlord has been accom-

<sup>40</sup> *Kneeland v. Schmidt*, 78 Wis. 345, 47 N. W. Rep. 438; *Armour Packing Co. v. Des Moines Pork Co.*, 116 Iowa 723, 89 N. W. Rep. 196.

<sup>41</sup> *Armour Packing Co. v. Des Moines Pork Co.*, 116 Iowa 723, 89 N. W. Rep. 196; *White v. Berry*, 24 R. I. 74, 52 Atl. Rep. 682. In such a case there is nothing to indicate a purpose on the part of the landlord in resuming possession to hold the tenant liable for the rent or to lease to others on account of the tenant. The mere collection of wharfage by a munic-

ipal corporation from a shipper who occasionally used a wharf which had been abandoned by the city's lessee is not the acceptance of a surrender by the municipal lessor. *Aberdeen Coal & Mining Co. v. City of Evansville*, 14 Ind. App. 621, 43 N. E. Rep. 316. Taking possession of the abandoned premises, repairing and advertising them for rent at an advance and collecting no rent from the old tenant for a year are an acceptance of a surrender. *Duffy v. Day*, 42 Mo. App. 638

panied. If it shall appear that the landlord intended thereby to accept the possession from the tenant, and thereby to release him from the payment of future rent an entry into possession it will constitute a surrender.<sup>42</sup> The general rule is applied to a re-entry of the landlord into possession. For in order to constitute a valid surrender there must be the assent of both parties to the lease to its rescission. This assent may sometimes be implied from the going into possession of a landlord after the tenant has vacated.<sup>43</sup> But usually it is absolutely necessary that the landlord should take some immediate steps to protect his property as soon as it is vacated by the tenant and his conduct in taking possession of the demised premises upon their abandonment by a tenant, where it appears that his sole motive was to preserve and protect the property from injury, will not be an acceptance of a surrender.<sup>44</sup> If the landlord takes possession and charge of the property after the tenant has abandoned it, merely to protect it from injury, or if, knowing that the tenant does not mean to return, he rents it on account of the tenant, these acts may not show an acceptance of the surrender on his part, but if, after an abandonment he takes possession and rents the premises on his own account this is conclusive evidence of a surrender.<sup>45</sup>

<sup>42</sup> Williamson v. Crossett, 62 Ark. 393; Terstegge v. First German Mu. Benefit Soc. 92 Ind. 82, 87, 47 Am. Rep. 135.

<sup>43</sup> Biggs v. Stueler, 93 Md. 110, 48 Atl. Rep. 727; Oldewurtel v. Wiesenfeld, 97 Md. 165, 54 Atl. Rep. 969.

<sup>44</sup> Whitman v. Louten, 3 N. Y. Supp. 754; Requa v. Domestic Pub. 32 N. Y. Supp. 125, 11 Misc. Rep. 322; Haynes v. Aldrich, 133 N. Y. 287, 31 N. E. Rep. 94; Bird v. Defonvielle, 2 Car. & K. 415; Wheeler v. Stevens, 6 H. & N. 155, 30 L. J. Ex. 46, 3 L. T. 702, 9 W. R. 233.

<sup>45</sup> Williamson v. Crossett, 62 Ark. 623, 36 S. W. Rep. 27; Hayes v. Goldman, 71 Ark. 251, 72 S. W. Rep. 563; Underhill v. Collins,

132 N. Y. 269, 30 N. E. Rep. 576; Huling v. Roll, 43 Mo. App. 234. Collecting rent and making small repairs on the premises which the tenant was bound to make, is not the acceptance of a surrender. Texas Loan Agency v. Fleming, 92 Tex. 458, 49 S. W. Rep. 1039; reversing 18 Tex. Civ. App. 668, 46 S. W. Rep. 63. It is a question for the jury whether the conduct of the landlord in placing sand upon, and filling in a lot, in building a dock in front of it and selling a large portion of the premises after the abandonment, by the tenant amounted to an acceptance of the surrender, or were merely acts which the landlord had a right to do upon the premises under a provision of the lease per-

**§ 729. The destruction of the written lease.** Inasmuch as a lease under seal is regarded in law as a deed which at once on being delivered to the lessee operates to transfer to him the right of possession, a destruction or cancellation of the writing itself, or its re-delivery by the lessee to the lessor, does not operate as a surrender. At the common law if a lease, being a deed, was destroyed by the mutual consent of the parties neither lessor nor lessee could maintain against the other the action of covenant based on any covenant in the lease, because the lease could not be produced. But if the lessee having accepted a lease under seal goes into possession thereunder and remains in possession after the lease in writing has been destroyed he is liable to the lessor in an action for use and occupation at the rent named in the lease, which is an incident to the reversion.<sup>46</sup> Modern rules are much more liberal. The erasure or cancellation of the writing upon a written lease will not alone divest the estate. Neither will such an effect be given to erasing or tearing off the names of the parties or the seals, or to the destruction of the entire written instrument by mutual consent. All such conduct does not alone constitute a rescission or surrender of the lease either in law or in equity though each and all of these acts, if done by the mutual consent of the parties to the lease, are relevant as some evidence, though never conclusive of a rescission and surrender. The destruction or cancellation of the lease does not bring about the rescission of the lease if the intent to rescind is not present in the act of destruction for the reason that the paper writing, though called the lease, in fact is not the lease at all but only the evidence of its existence.<sup>47</sup> The fact that a lease is found in the possession of the lessor with the names of the parties erased or torn off, is not sufficient alone to show a surrender by cancellation. These facts may suggest that the parties intended to surrender but the mode of a surrender re-

mitting him to enter to make such alterations or repairs as he shall deem necessary for the preservation of the premises. Kneeland v. Schmidt, 78 Wis. 345, 47 N. W. Rep. 438.

<sup>46</sup> Ward v. Lumley, 5 H. & N. 87, 94, 29 L. J. Ex. 322, 1 L. T. 376, 8 W. R. 184.

<sup>47</sup> Brewer v. National Union Building Ass'n, 46 N. E. Rep. 752, 166 Ill. 221; affirming 41 Ill. App. 223; Hatch v. Hatch, 9 Mass. 307, 312; Smith v. McGowan, 3 Barb. (N. Y.) 404; Co. Litt. 225b; Wooley v. Gregory, 2 Y. & J. 536, 31 R. R. 626.

quired under the Statute of Frauds must be observed to express their intention. This is not a surrender by deed or note in writing as required by the statute of Frauds nor by operation of law as excepted from the statute. The cancelled lease is still binding on the parties to it.<sup>48</sup> The cancellation may be some evidence of an intention on the part of the lessor to cancel the lease which must be considered in connection with an abandonment of the premises by the lessee. But under such circumstances where the lessor alleges and the lessee denies a surrender, the burden of proof is upon the lessor to prove the surrender and not upon the lessee to explain away any presumption which may arise from the condition and custody of the lease.

**§ 730. The effect of a surrender upon the lease.** The effect of a surrender is to terminate the relation of landlord and tenant, and to put an end to the lease so far as the rights of the parties to it are concerned, and to their reciprocal duties and obligations. For a surrender at once terminates all covenants in the lease in favor of either party where no cause of action has accrued or matured during the life of the lease.<sup>49</sup> Neither has the

<sup>48</sup> Doe d. Courtail v. Thomas, 4 M. & Ry. 218, 9 B. & C. 288, 7 L. J. (O. S.) K. B. 214.

<sup>49</sup> Silva v. Bair, 141 Cal. 599, 75 Pac. Rep. 162; Okie v. Person, 23 App. D. C. 170; Monig's Adm's. v. Phillips, 16 Ky. Law Rep. 838, 29 S. W. Rep. 970; Hesseltine v. Seavey, 16 Me. 212, 214; Farson v. Goodale, 8 Allen (Mass.) 202; Randall v. Rich, 11 Mass. 494; Hahham v. Sherman, 114 Mass. 19; Deane v. Caldwell, 127 Mass. 242, 248; Amory v. Kannofsky, 117 Mass. 35; Logan v. Anderson, 2 Doug. (Mich.) 101; Kiernan v. Germain, 61 Miss. 498; Elliot v. Aiken, 45 N. H. 30; Stotesburg v. Vail, 13 N. J. Eq. 390; Reed v. Snowhill, 51 N. J. Law, 162, 16 Atl. Rep. 679, 10 Atl. Rep. 737; Bedford v. Terhune, 30 N. Y. 453, 462, 86 Am. Dec. 394; Danziger v.

Falkenberg, 64 Hun. 635, 18 N. Y. Supp. 927; Simers v. Saltus, 3 Denio (N. Y.) 214, 217; Davison v. Donadi, 2 E. D. Smith (N. Y.) 121; Curtiss v. Miller, 17 Barb. (N. Y.) 477, 479; Everett v. Williamson, 107 N. Car. 204, 213, 12 S. E. Rep. 187; Wister v. Campbell, 10 Phila. (Pa.) 359; Greider's App. 5 Pa. St. 422; Geddie v. Folliett, 16 S. D. 610, 94 N. W. Rep. 431; Patchins Ex's. v. Dickerson, 31 Vt. 666; Clator v. Otto, 38 W. Va. 89, 91, 18 S. E. Rep. 378; American Bonding Co. v. Pueblo Investment Co., 150 Fed. Rep. 17; Imler v. Baenisch, 74 Wis. 567, 43 N. W. Rep. 490; Jones v. Carter, 15 Mee. & Wel. 718; Whitehead v. Clifford, 5 Taunt. 518, 15 R. R. 579; Dodd v. Acklom, 6 Man. & G. 672, 7 Scott (N. R.) 415, 13 L. J. C. P. 11, 7 Jur. 1017; Bird v.

landlord, after he has accepted a surrender of the premises, a cause of action for damages against his former tenant by reason of the diminished rent paid thereafter by a tenant whom he has accepted under a new lease in place of his former tenant.<sup>50</sup> But a surrender or the rescission of a lease after rent has accrued, does not prevent its subsequent recovery by the landlord.<sup>51</sup> If, however, there is a surrender of the premises before rent is due, the rule is otherwise. There is no apportionment of rent up to the date of surrender. The acceptance of a surrender by the landlord prevents him not only from recovering rent accruing in the future but also where it takes place during a rental period, it prevents him from recovering for occupation for any period short of the whole period.<sup>52</sup> The rent for the whole of the period which is not then due, is extinguished, and the landlord can compel the tenant to pay no part thereof.<sup>53</sup> It is competent and binding for the parties to the lease expressly to provide that the lessee shall not be released from liability on his covenant for the payment of rent, or on the other covenants of the lease by a surrender of the lease. Under such a provision the surrender to the landlord of the premises on his demand upon the default of the lessee to pay rent does not release the lessee from the payment of the rent as it afterwards accrues, though it may as to the lessee and his rights constitute a

Defonvielle, 2 Car. & K. 415. The landlord, if he has not been permitted to enter, is entitled to immediate possession. The surrender of the demised premises and their acceptance by the landlord are a defense to a claim by the latter, Stiefel v. Rothschild, 72 N. Y. Supp. 171, 173, for the rent subsequently accruing. Watson v. Merrill, 136 Fed. Rep. 359; Clator v. Otto, 38 W. Va. 89, 91.

<sup>50</sup> Everett v. Williamson, 107 N. Car. 204, 213, 12 S. E. Rep. 187; Deane v. Caldwell, 127 Mass. 242, 248.

<sup>51</sup> Kastner v. Campbell, (Ariz. 1897,) 53 Pac. Rep. 586; Sperry v. Miller, 8 N. Y. 336, 339, 16 N.

Y. 407; Kensie v. Farrell, 17 N. Y. Super. Ct. 192; Fitch v. Sargeant, 1 Ohio, 352; Barlow v. Wainwright, 22 Vt. 88, 53 Am. Dec. 79.

<sup>52</sup> Grimman v. Legge, 8 B. & C. 324, 2 M. & Ry. 438, 6 L. J. (O. S.) K. B. 321. In this case which seems contrary to the general rule, there was an express contract by the tenant to pay rent at the end of the quarter and the decision went upon the theory that the parties had expressly rescinded this contract.

<sup>53</sup> Ireland v. U. S. Mortgage & T. Co., 72 App. Div. 95, 102, affirmed in 175 N. Y. 491, 67 N. E. Rep. 1083.

surrender of the lease.<sup>54</sup> The acceptance by the lessor of a surrender from a tenant who has become a bankrupt together with the refusal of the landlord to consent that the unexpired term shall be sold as a part of the estate of the bankrupt is a waiver by the landlord of all his rights under a covenant in the lease that upon the bankruptcy of the tenant the rent reserved for the whole term shall at once become due and payable.<sup>55</sup> On the other hand the tenant after the surrender can acquire no rights as against his former landlord by reason of breaches of covenant subsequently occurring. Thus the tenant cannot recover from the landlord damages for the removal of his goods from the premises after the voluntary surrender by him of leased premises which have been condemned as unsafe and dangerous, and the lease has been rescinded and the premises surrendered.<sup>56</sup> The interests and rights of a sub-tenant cannot be defeated by the surrender of his lessor's lease to the original lessor.<sup>57</sup> The sub-tenant is in no wise affected by the surrender by the original lessee of his lease to the original lessor. If the sub-tenant thereafter remain in possession he becomes a tenant of the original lessor and must perform the obligations of his lease to the original lessor to the same extent as to his own lessor.<sup>58</sup> And one who holds a sub-lease after knowledge that his lessor has surrendered, pays the rent to the original lessor, and endeavors to obtain a new lease from him, is thereafter estopped to assert that he holds of his own lessor for he has by his conduct become a tenant at will of the original lessor.<sup>59</sup>

<sup>54</sup> Heims Brewing Co. v. Flannery, 137 Ill. 309, 27 N. E. Rep. 286.

<sup>55</sup> *In re Winfield*, 137 Fed. Rep. 984, citing *Platt v. Johnson*, 168 Pa. St. 935, 47 Am. St. Rep. 877 in which such a provision is held to be valid followed in *Teufel v. Rowan*, 179 Pa. St. 408, 36 Atl. Rep. 224, and *Wilson v. Penna. Trust Co.*, 114 Fed. Rep. 742, 52 C. C. A. 374.

<sup>56</sup> *Stoeffel v. Rothschild*, 72 N. Y. Supp. 171.

<sup>57</sup> *Moskowitz v. Diringen*, 48 Misc. Rep. 543, 96 N. Y. Supp. 173; *Cuschner v. Westlake*, 43 Wash. 690, 86 Pac. Rep. 948.

<sup>58</sup> *Appleton v. Ames*, 150 Mass. 34, 42, 22 N. E. Rep. 69; *McKenzie v. Lexington*, 4 Dana (Ky.) 129; *Morrison v. Sohn*, 90 Mo. App. 76; *Weiss v. Mendelson*, 24 Misc. Rep. 692, 53 N. Y. Supp. 803.

<sup>59</sup> *Appleton v. Ames*, 150 Mass. 34, 43, 22 N. E. Rep. 69

## CHAPTER XXIX.

### THE DUTIES OF THE PARTIES AS REGARDS FIXTURES.

- § 732. The topic of fixtures generally.
- 733. Common law rule as to chattels annexed.
- 734. General rules for determining what are fixtures
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- § 761. The liability of a landlord for personal property of his tenant left on the premises at the expiration of the lease.
- 762. The remedies of the parties.
- 763. The measure of damages to the tenant for the conversion of his chattels by the landlord.
- 764. The measure of the damages for the breach of the landlord's covenant to make improvements.
- 765. The proof of a custom in respect to fixtures.
- 766. The right of a tenant who has covenanted to surrender in good condition to remove his improvements.

**§ 732. The topic of fixtures generally.** The word "fixtures" in its legal meaning describes articles which are in themselves personal property but which have become a part of the land in fact, though not always in law, by being affixed to it. Thus, commonly we speak of tenant's fixtures where the articles of personal property are owned by the tenant but are attached to the land. In strictness of language the word fixture means an article of personal property which has, by being attached to the land, become the property of the owner of the land. If this be the true meaning of the word it is an incorrect use of language to speak of the tenant's fixtures in which a landlord has no ownership. The use of the word is comparatively modern and the thing itself regarding it as a topic of legal consideration is of comparatively modern origin, for it was not until the great spread of trade and manufacturing in England that the law of fixtures began to develop as between landlord and tenant. The general principles of that branch of law are comparatively well settled but in their application there is much difficulty. By some writers the law itself has been considered impossible of reduction to invariable rules or to any uniform system. It has been characterized as fluctuating and shifting and as depending largely upon the facts in each particular case. But this is a defect which is generally inherent in the application of general rules in any branch of the law, and, while there has been probably much judicial legislation and lack of harmony in formulating the law of fixtures, yet there is probably no more difficulty in this branch of the law in applying general rules to any particular case when the facts are ascertained than in any other department of the law. In this chapter it will be the effort of the writer to state as accurately as possible such general rules as may be com-

paratively well settled with a consideration of a number of instances in which these rules have been implied.<sup>1</sup>

**§ 733. Common law rule as to chattels annexed.** By the common law chattels which have been physically annexed or attached to the demised premises by the tenant during the term be-

<sup>1</sup> "The difficulty of giving a definition of this word which will apply to all cases appears as soon as we begin to examine the law on the subject. The word has been used by many writers in various senses, and this ambiguity has so often been followed even in adjudicated cases that the law on the subject has been thrown into great confusion. Another element of uncertainty is the fact that so many exceptions have been allowed to modify the original idea of a fixture, that now each case must be decided rather upon the circumstances that surround it, than upon any general principle that can be evolved from the law. In fact, so many exceptions to the law have occurred, that many writers and courts have been constrained to throw aside the definition as used in the earlier law on this subject, and to adopt one whose import is almost opposite in meaning. Thus a fixture has been defined to mean a personal chattel annexed to the freehold and which may be severed and removed by the party who has annexed it, against the will of the owner of the freehold. *Pickerel v. Carson*, 8 Iowa, 544; *Sheen v. Ritchie*, 5 M. & W. 175; *Ex parte Barclay et al.*, 5 De G. M. & G. 403; *Halben v. Runder*, 1 C. M. & R. 264; *Taylor's Land. & Ten.* 544, note 1; *Bouvier's Law Dict.* tit. Fixtures; 2 Par. Cont. 431; Amos and Ferard's *Law of Fixtures*, 2.

It is difficult to define the term 'fixtures' and there is inexplicable confusion both in the text books and in the adjudged cases as to what is such an annexation of chattels to realty as to make them part and pass by a conveyance of the realty. An attempt to reconcile the authorities on the subject would be futile, and to review them would be an endless task." As was well observed by Kent, J. in *Strickland v. Parker*, 54 Me. 263: "It is not to be disguised that there is an almost bewildering difference and uncertainty in the various authorities, English and American, on this subject of fixtures, and on the question of what passes by a transfer of the realty. One thing is quite clear in the midst of the darkness, and that is, that no general rule applicable to all cases and to all relations of the parties can be extracted from the authorities." *Thomas v. Davis*, 76 Mo. 72. The term fixture is used in different senses; sometimes it is used of a thing which is affixed to land, sometimes it is used to designate a thing which can be severed from land after having been affixed to it. In this sense it is a term the very reverse of the name. Less frequently it has been used to designate a thing which cannot be removed after having been affixed to land. *Miller v. Waddingham*, (Cal.) 25 Pac. Rep. 689, 11 L. R. A. 510. Compare to the same effect

come a part thereof. They are hence a part of the freehold and are owned by the landlord at the expiration of the term and cannot be removed by the tenant without the consent of the landlord.<sup>2</sup> This however is only a presumption and is rebuttable by proof of an express agreement to the contrary existing between the parties to the lease. Hence it is only by express agreement that a tenant can recover from his landlord the value of improvements made by him. Sometimes such an agreement may be implied from the actions of the landlord. But the mere fact that a landlord silently stands by while his tenant attaches chattels to the freehold, without protest or warning does not constitute by estoppel an agreement on the part of the landlord to pay for them.<sup>3</sup> And the common law rule above stated was never inflexible and without its exceptions. A material element in applying it was to ascertain the relationship of the parties who claimed title. The rule that whatever is annexed to the realty becomes part of it and cannot thereafter be removed is construed strictly in favor of the heir as against the executor. As between vendor and vendee it is construed rather less strictly in favor of

the remarks of the Court in *Fechet v. Drake*, 2 Ariz. 239, 12 Pac. Rep. 694. Fixtures are a sort of property which are on the dividing line between real and personal property being the one or the other according to the circumstances and the intention of the party. *Ottumwa Woolen Mill Co. v. Hawley*, 44 Iowa 57, 60, 24 Am. Rep. 719.

<sup>2</sup> *McNally v. Connolly*, 70 Cal. 3, 11 Pac. Rep. 320; *Wright v. Du Bignon*, 114 Ga. 765, 40 S. E. Rep. 747; *Thomson v. Smith*, 111 Iowa 718, 83 N. W. Rep. 789; *Gray v. Oyler*, 2 Bush (Ky.) 256; *Osgood v. Howard*, 6 Me. 452, 454, 20 Am. Dec. 322; *Madigan v. McCarthy*, 108 Mass. 376, 11 Am. Rep. 371; *Pond & Hasey Co. v. O'Connor*, 70 Minn. 266, 73 N. W. Rep. 159; *Schlemmer v. North*, 32 Mo. 206; *Friedlander v. Rider*, 30 Neb. 783,

47 N. W. Rep. 83; *Brownell v. Fuller*, 60 Neb. 558, 83 N. W. Rep. 669; *Lamphere v. Lowe*, 3 Neb. 131; *Moore v. Moore*, Neb. 89 N. W. Rep. 629; *Fortescue v. Bowler*, 55 N. J. Eq. 741, 38 Atl. Rep. 445; *Deane v. Hutchinson*, 40 N. J. Eq. 83, 2 Atl. Rep. 292; *Kissam v. Barclay*, 17 Abb. Pr. (N. Y.) 360; *Fisher v. Saffer*, 1 E. D. Smith (N. Y.) 611; *Ombony v. Jones*, 19 N. Y. 234, 240; *Davis v. Porter*, 10 Ohio Cir. Ct. Rep. 243, 3 Ohio Dec. 427; *Carver v. Gough*, 153 Pa. St. 225, 228, 25 Atl. Rep. 1124, 32 W. N. C. 72; *Bovet v. Holzgraf*, 5 Tex. Civ. App. 141, 23 S. W. Rep. 1014; *Boyd v. Douglass*, 72 Vt. 449, 48 Atl. Rep. 638; *Tunis Lumber Co. v. R. G. Dennis Lumber Co.*, 97 Va. 682, 34 S. E. Rep. 613.

<sup>3</sup> *Gocio v. Day*, 51 Ark. 46, 9 S. W. 433.

a vendee. As between tenant for life or tenant in tail and the reversioner the rule is construed liberally in favor of the former as against the latter. As between landlord and tenant the rule has always been construed very liberally in favor of the tenant. So liberal has this construction been in the case of landlord and tenant it may with truth be said that there is a *prima facie* presumption that the rule does not apply to the relationship at all. The most extensive exception to the rule of the common law has been that of tenant's trade fixtures. This exception indeed was recognized from a very early period.<sup>4</sup>

**§ 734. General rules for determining what are fixtures.** In spite of the uncertainty which exists in the cases there are some general rules that have been substantially agreed upon by them by which it may be determined whether the article in question is or is not a fixture. These general rules furnish a uniform test which, when applied to the particular facts of a case, enable one to determine the character of the fixtures, and, at the same time, to harmonize at least some of the cases which are apparently in conflict. The rules, which are three in number, may be concisely stated as follows: *First*, the article which is a fixture must be actually annexed to the realty or to something appurtenant to it. *Second*, it must also be appropriate to the use or purpose of that portion of the real property with which it is connected. *Third*, the party having made the annexation must have intended it to be a permanent addition to the realty.<sup>5</sup> The permanency of the annexation of the article to the premises has been considered by many of the authorities and particularly by the older authorities to be a very material, if not the most material, element of the definition. It was at one time regarded as very important and in most cases conclusive that the articles were attached to the building in such a way as to render them stable, and it was said that if the process of removal should result in any injury to the freehold the articles would, presumptively at least, be regarded as fixtures, that is, it would be presumed from this fact merely that the parties did not intend that they should ever be removed.<sup>6</sup> The permanency of the annexation to the premises and the difficulty of removing the fixtures,

<sup>4</sup> Van Ness v. Pacard, 2 Pet. (U. S.) 137, 7 L. Ed. 374.

<sup>5</sup> Teaff v. Hewitt, 1 Ohio St. 511.  
<sup>6</sup> Swift v. Thompson, 9 Conn. 63.

without injury to the premises are, as a matter of fact, the same thing and neither fact necessarily furnished a basis for the presumption that the parties intended the personal property to remain. Any presumption of intention which is based upon the permanency of the annexation or the injury caused by removal is merely a fiction of law. This presumption or fiction has lost a great deal of its force in modern times, if indeed it has not been superseded as a basis for a presumption. That an article of personal property cannot be removed without injury to the premises is not now deemed to be controlling though it is always a fact which the court has a right to consider.<sup>7</sup> In modern times it is a rule that there is no conclusive presumption to be based on any one element in the definition alone and that the mode of use or the matter of annexation are not in all cases conclusive. In most cases it depends on the express or implied intention of the parties concerned.<sup>8</sup> This intention may be expressed; or, it may be implied by the nature of the article itself, the relation of the parties to the annexation, the structure and the mode of annexation, and the purpose or use to which the article was put. From all these the intention may be implied and they should all be taken together, without due prominence being given to any one of them in determining what the intention of the parties is. The rules for determining whether an article of personal property is or is not a fixture are by no means the same as between vendor and vendee, mortgagor and mortgagee, lienor and licensee as they are between landlord and tenant. The reason of this is that in the former cases the use and possession of the premises are permanent or may be presumed to be intended to be permanent while in the case of the relationship of landlord and tenant the use and occupation are transitory in the large majority of cases. In other words where a grantor, mortgagor or other lienor has placed personal property upon the land and has permanently attached it thereto it may be reasonably assumed that he meant the annexation of the chattel to the land to be of the same character and duration as his ownership and enjoyment of the premises. But a tenant's possession being transitory furnishes no such presumption of a permanent annexation. It may

<sup>7</sup> Voorhees v. McGinnis, 48 N. Y. 278.      <sup>8</sup> Wheeler v. Bedell, 40 Mich. 693.

reasonably be presumed that the tenant meant the annexation of the personal property to the real property to be of the same transitory character as is his own possession.

**§ 735. The intention of the parties to the lease.** The intention of the parties to the lease upon the question whether personal property actually annexed to the freehold shall be regarded as becoming thereby a part of it or whether it shall retain its character as personality is always controlling when it can be discovered.<sup>9</sup> If they have embodied such intention in a covenant or stipulation of the lease it is readily and easily ascertained and when thus ascertained it will be controlling and cannot be altered, enlarged or modified by parol evidence.<sup>10</sup> When the parties have not expressed their intention in the lease the court may look to the facts and circumstances to ascertain the intention. The evidence will then take a wide range. Though the intention which will be sought is that of both the parties, still the intention of one with the acquiescence of the other may be sufficient. Whether a chattel becomes a fixture depends upon the character of the act by which it is put into its place, the uses to which it is put, the policy of the law connected with its purpose and the intention of those concerned. Before personal property can become a fixture by actual physical annexation to land the intention of the parties and the use to which it is put, must combine and operate to change its nature from that of a chattel to that of a fixture.<sup>11</sup> For the chief test by which to determine whether an article is a fixture is to inquire whether the party annexing it intended it to be a permanent accession to the freehold.<sup>12</sup> The intention of the parties as in most cases where

<sup>9</sup> *Hayford v. Wentworth*, 97 Me. 347, 351, 54 Atl. Rep. 940.

<sup>10</sup> *Center v. Everard*, 19 Misc. Rep. 156, 43 N. Y. Supp. 416.

<sup>11</sup> *Atchison, etc. R. Co. v. Morgan*, 42 Kan. 23, 21 Pac. Rep. 809, 4 L. R. A. 284, 16 Am. St. Rep. 471. The question of fixtures or not depends upon the nature and character of the act by which the structure is put in place, the policy of the law connected with its purpose, and the intention of

those concerned. *Meig's Appeal*, 62 Pa. St. 28. The clear tendency of modern authorities seems to be to give pre-eminence to the question of intention to make the article a permanent accession to the freehold and the other tests seem to derive their chief value as evidence of such intention. *McLean v. Palmer*, 2 Kulp (Pa.) 349, 353.

<sup>12</sup> *Strickland v. Parker*, 54 Me. 263, 265, 266; *Gartlan v. Hickman*, 56 W. Va. 75, 49 S. E. Rep. 1418,

it has not been committed to writing must be sought in the evidence of the surrounding facts and circumstances. Thus as indicating the tenant's intention the fact that a tenant, both prior to and at the time of the purchase of chattels and at the time he brought such property upon the premises always treated them as personality, and to obtain the money with which he paid for them gave a chattel mortgage upon them to a third person strongly indicates that he regarded them as chattels and not as being permanently annexed to the premises.<sup>13</sup> The courts now very generally discard the old test of the physical character of the annexation of a chattel to the premises and hold that a chattel is not merged in the realty unless (1) it is not only physically annexed by juxtaposition to the realty, or some appurtenance thereof; (2) and it is adapted and usable with that part of the realty to which it is annexed; and (3) but it must have been so annexed with the intention, on the part of the person making the annexation to make it a permanent accession and a part of the realty.<sup>14</sup> And while it is impossible to reconcile all the cases upon this subject of fixtures yet the modern and most approved rule appears to give special and usually controlling prominence to the intention of the party making the annexation. An evident corollary of the modern rule thus established is that the burden of showing the existence of these requisites for the merger of a chattel including the intention, is upon the party claiming the chattel to have become merged in the realty.<sup>15</sup> And the inten-

<sup>13</sup> L. R. A. 694; Edwards & Bradford Lumber Co. v. Rank, 57 Neb. 323, 77 N. W. Rep. 765, 73 Am. St. Rep. 514, 518; Fifield v. Farmers Nat. Bank, 148 Ill. 163, 35 N. E. Rep. 802, 39 Am. St. Rep. 166.

<sup>14</sup> Ames v. Trenton Brewing Co., 56 N. J. Eq. 309, 38 Atl. Rep. 858.

<sup>14</sup> Readfield T. & T. Co. v. Cyr., 95 Me. 287, 289, 49 Atl. Rep. 1047 and cases there cited. For other authorities to the same effect see Baker v. Fessenden, 71 Me. 293; Voorhees v. McGinnis, 48 N. Y. 282; Dana v. Burke, 62 N. H. 627; McMillan v. N. Y. Water Proof Paper Co., 29 N. J. Eq. 610; Teaff

v. Hewitt, 1 Ohio St. 511, 59 Am. Dec. 645; Hill v. Wentworth, 28 Vt. 428, 437; Livingston v. State, 96 Ala. 44, 11 So. Rep. 334; Hill v. Sewald, 53 Pa. St. 271, 91 Am. Dec. 209; Ames v. Trenton Brewing Co., 56 N. J. Law 309, 38 Atl. Rep. 858; affirmed in 57 N. J. Eq. 347, 45 Atl. Rep. 1090; Seeger v. Pettit, 77 Pa. St. 437.

<sup>15</sup> Hill v. Wentworth, 28 Vt. 428, 437; Baker v. Fessenden, 71 Me. 293; Munroe v. Armstrong, 179 Mass. 165, 60 N. E. Rep. 475; Knickerbocker Trust Company v. Penn. Cordage Co., 62 N. J. Eq. 624, 50 Atl. Rep. 459. By the

tion of the parties in placing personal property upon the premises, is always, where there is a conflict in the evidence, a question for the jury.<sup>16</sup> We will in the next section consider the character of trade fixtures.<sup>17</sup>

**§ 736. The modern rule as to trade fixtures.** The strict rule of the early common law under which chattels which had been physically annexed to the freehold became the absolute property of the landlord has been gradually and greatly relaxed in favor of tenants. The first exception to this rule was made in the case of trade fixtures so called such as were placed upon the premises by the tenant during the term for the purpose of carrying on trade, commerce or manufacture. It is now a general rule that whatever is affixed, as a trade fixture to the land or to any building which is on the land during the term whether made of wood, stone, iron or other material, is removable by the tenant at the end of the term. And it is difficult to conceive of any so-called fixture, however solid, permanent and closely attached to the realty which is placed there for the sole purpose of trade which may not be removed by the tenant at the end of his term.<sup>18</sup> Hence according to the modern rule both in England and America fixtures which have been placed or erected by a tenant upon premises which he occupies for the purpose of carrying on a trade or occupation and which are accessory to his complete and full enjoyment of the term continue to be his personal

Court in *Hayford v. Wentworth*, 97 Me. 347, 54 Atl. Rep. 940, 941.

<sup>16</sup> *Seeger v. Pettit*, 77 Pa. St. 437; *Turner v. Wentworth*, 119 Mass. 459; *Allen v. Mooney*, 130 Mass. 155.

<sup>17</sup> "It is well settled that houses or other structures of a permanent character, erected upon the land of another under an agreement, express or implied, that they are to remain the personal property of the builder do not attach to and become annexed to the realty. In the absence of any agreement, express or implied, or evidence of intention, everything which is annexed to the freehold becomes a

part of the realty, and cannot be severed from it and re-invested with the character of personal property except by the owner of the land. *Freeman v. Lynch*, 8 Neb. 192, 199.

<sup>18</sup> *Nigro v. Hatch* (Ariz.) 11 Pac. Rep. 177; *Commissioners v. Brown*, 2 Colo. App. 473, 31 Pac. Rep. 525; *Ross v. Campbell*, 9 Colo. App. 38, 47 Pac. Rep. 465; *Conrad v. Mining Co.*, 54 Mich. 249, 20 N. W. Rep. 39 (Engines and boilers); *Andrews v. Button Co.*, 132 N. Y. 348, 353, 30 N. E. Rep. 831; *Wiggins Ferry Co. v. Railroad Co.*, 142 U. S. 396, 12 Sup. Ct. Rep. 188.

property during the term, and, upon its expiration, they may be removed by him doing as little injury to the freehold as possible.<sup>19</sup> And from the cases cited in the note it will unquestionably appear that in the case of trade fixtures their size or the fact that they are actually annexed to the realty is in no way material on the question of the right of the tenant to remove them.<sup>20</sup>

<sup>19</sup> Nigro v. Hatch, 2 Ariz. 144, 11 Pac. Rep. 177; Updegraff v. Lesem, 15 Colo. App. 297, 62 Pac. Rep. 342; Powell v. Bergner, 47 Ill. App. 33; Traders' Bank of Kirwin v. First National Bank, 6 Kan. App. 400, 50 Pac. Rep. 1098; Roth v. Collins, 109 Iowa 501, 80 N. W. Rep. 543; Johnson v. Mosher, 82 Iowa 29, 47 N. W. Rep. 996; (shelving and counters) Walton v. Wray, 54 Iowa, 531, 6 N. W. Rep. 742; (grain elevator) Wilgus v. Gettings, 21 Iowa, 177; Hanrahan v. Reilly, 102 Mass. 201; (bowling alley) Weathersby v. Sleeper, 42 Miss. 732; (building) Perkins v. Swank, 43 Miss. 349; McLain Inv. Co. v. Cunningham, (Mo. 1905) 87 S. W. Rep. 605; Raymond v. White, 7 Cow. (N. Y.) 319; Smusch v. Kohn, 22 Misc. Rep. 344; (partition, chandeliers and showcases), 49 N. Y. Supp. 176; Livingston v. Sulzer, 19 Hun. (N. Y.) 375; (a large building) *In re City of Buffalo*, 1 N. Y. St. Rep. 742; Overman v. Sasser, 107 N. Car. 432, 12 S. E. Rep. 64; Woodworking Co. v. Southwick, 119 N. Car. 611, 26 S. E. Rep. 253; (back bar and refrigerator) Belvin v. Raleigh Paper Co., 123 N. Car. 138, 31 S. E. Rep. 657; Pemberton v. King, 2 Dev. (N. Car.) 376; Lemar v. Miles, 4 Watts (Pa.) 330; Davis v. Moss, 38 Pa. St. 346; Kile v. Geihner, 114 Pa. St. 381, 7 Atl. Rep. 154; Sweet v. Meyers, 3 S.

D. 324, 53 N. W. Rep. 187; Cubbins v. Ayres, 4 Lea. (Tenn.) 329; Tunis Lumber v. R. G. Dennis Lumber Co., 97 Va. 682, 34 S. E. Rep. 613; Brown v. Reno Electric Light Co., 55 Fed. Rep. 229; Van Ness v. Pacard, 2 Pet. (U. S.) 141.

<sup>20</sup> "All the old cases, some of which are in the Year Books, and Brooks' Abridgement, agree that whatever is connected with the freehold, as wainscot, furnaces, pictures fixed to the wainscot, even though put up by the tenant belong to the heir. But there has been a relaxation of the strict rule in that species of cases for the benefit of trade between landlord and tenant, that many things may now be taken away which formerly could not, such as erections for carrying on any trade, marble chimney-pieces, and the like, when put up by the tenant." By Lord Mansfield in Lawton v. Salmon, 1 H. Blackstone, 259. The primary meaning of the word fixtures was anything fixed; but this meaning if carried too far, will not give the proper signification of the word. Often the word is used to signify all articles attached to the realty, such as permanent buildings, together with the windows, doors, keys, etc. These it would seem are indeed really portions of the realty, and should not be included in the word fixtures. The better reason-

The difficulty in these cases is not in the rule of trade fixtures but in applying it to the particular circumstance of each case. Speaking in general trade fixtures are articles of personal property which are annexed by the tenant to the freehold for the purpose of enabling him to use the premises for the purpose of the trade which he carries on therein. Whether articles are trade fixtures depends upon the character of the property and the use to which the property is put by the tenant. In the case of trade fixtures their permanent annexation to the premises is not material. The test is not the physical annexation of the articles used for trade purposes but what was the intention of the owner when he placed them on the premises. If he placed them there solely for the purpose of carrying on a trade or business it will be presumed that he intended to remove them when it was no longer possible for him to carry on that business on the premises. This will be when the lease comes to an end. It follows, therefore, that the tenant may remove his trade fixtures when he surrenders possession of the premises. Almost every conceivable article of personal property may be a trade fixture irrespective of its bulk or character. Thus, a one story wooden building with a foundation laid on the ground upon which rest short posts which sustain the main building and which was built and was used by a tenant who carried on the lumber business is a trade fixture.<sup>21</sup> So a fire engine or steam engine used for working a coal mine is a trade fixture.<sup>22</sup> And the same construction and

ing seems to be that the word fixtures may designate property which by its use is attached to the soil, but is capable of being removed. Fixtures that are not removable exist only between the grantor and grantee or between heir and executor and the like; but as between landlord and tenant the other class only is applicable. The character of trade fixtures does not depend on annexation to the soil, nor mere weight and bulk; and it has been held in many cases that a tenant may take away whatever he erects for the purpose of carrying on his

trade, whether it be machinery or building, and even though attached to the soil. The intention of the tenant in making the annexation is the controlling test. It is natural that the intent of the owner shall be to make permanent improvements. It is natural that the tenant in making improvements to assist him in his trade shall make them with the intention of removing them to other land. *Menger v. Ward* (Tex.), 28 S. W. Rep. 821.

<sup>21</sup> *Macdonough v. Starbird*, 105 Cal. 15, 38 Pac. Rep. 510.

<sup>22</sup> *Lawton v. Lawton*, 3 Atk. 13

definition have been applied to a bowling alley,<sup>23</sup> to salt pans erected by a tenant for working salt works,<sup>24</sup> to ranges, boilers and brick works by which they are supported and to plumbing and gas fixtures,<sup>25</sup> to gas pipe and similar chattels used in connection with a gas or oil well,<sup>26</sup> to coppers and all sorts of brewing vessels and pipes, and other similar apparatus in a brewery, and a cider mill and press,<sup>27</sup> to ovens and boilers placed in a bakery on brick foundation,<sup>28</sup> to machinery placed in a building and fastened to the floor with cleats and bolts so as to be easily removed,<sup>29</sup> to a temporary sheeting partition and a cold storage box.<sup>30</sup> There are very many cases where a building of a cumbersome and substantial character used by the tenant for the purpose of his occupation has been regarded as his fixture. And the courts in modern times have been disposed to give the word a very extensive and inclusive meaning in the case of large buildings owned by the tenant and used by him in the course of his business. Thus, a depot building erected by a railway company,<sup>31</sup> an engine house partly of wood and partly of stone, with stone foundation having a steam engine for the use of a coal mine,<sup>32</sup> a saw mill,<sup>33</sup> a brick engine house with machinery which was no part of the other buildings on the premises and was intended to protect the engine,<sup>34</sup> and a scenic railway, consisting of a pavillion with a series of elevated tracks starting from and returning to it with the machinery and apparatus,<sup>35</sup> a wooden building standing on blocks and rollers so that it could be re-

Ld. Dudley v. Ld. Warde, Ambler,  
114.

<sup>23</sup> Hanrahan v. O'Reilly, 102  
Mass. 201.

<sup>24</sup> Lawton v. Salmon, 1 H. Black  
259, 3 Atk. 16; Hewitt v. Water-  
town Steam Engine Co., 65 Ill.  
App. 153.

<sup>25</sup> Lawton v. Lawton, 3 Atk. 15;  
Livingston v. Sulzer, 19 Hun. (N.  
Y.) 375.

<sup>26</sup> Shellar v. Shivers, 171 Pa. St.  
569, 33 Atl. Rep. 95.

<sup>27</sup> Holmes v. Tremper, 20 John  
(N. Y.) 29; Lawton v. Lawton, 3  
Atk. 14.

<sup>28</sup> Baker v. McClurg, 96 Ill. App.  
165.

<sup>29</sup> Bartlett v. Haviland, 92 Mich.  
552, 52 N. W. Rep. 1008.

<sup>30</sup> Ward v. Earl, 86 Ill. App. 635.  
<sup>31</sup> Western North Carolina R. Co.

v. Deal, 90 N. Car. 110.

<sup>32</sup> White's Appeal, 10 Pa. St. 252.  
<sup>33</sup> Witherspoon v. Nickels, 27  
Ark. 332.

<sup>34</sup> Smith v. Whitney, 147 Mass.  
479, 18 N. E. Rep. 229.

<sup>35</sup> L. A. Thompson Scenic Rail-  
way Co. v. Young, 90 Md. 278, 44  
Att. Rep. 1024.

moved,<sup>36</sup> an ice house built of wood, with 2,000 tons capacity,<sup>37</sup> a wooden building used by a photographer, without cellar or chimney,<sup>38</sup> a ball room sixty feet by thirty in dimension erected by the lessee of an inn and resting on stone posts,<sup>39</sup> and sheds erected upon posts for the purpose of making bricks,<sup>40</sup> have been held to be removable by a tenant as partaking of the character of trade fixtures. The liberal rules and principles of the law regulating the subject of trade fixtures are usually applicable to regulate the respective rights and obligations of the parties to a lease of premises for the purpose of carrying on a saloon. These rules and principles have been applied in connection with bars, back bars and counters, ice boxes, beer and ale pumps and pipes and other articles, tools and appliances for carrying on the saloon business.<sup>41</sup>

<sup>36</sup> Robinson v. Wright, 2 MacArthur, (D. C.) 54.

<sup>37</sup> Antoni v. Belknap, 102 Mass. 193.

<sup>38</sup> O'Donnell v. Hitchcock, 118 Mass. 401.

<sup>39</sup> Ombony v. Jones, 19 N. Y. 234, 239 affirming 21 Barb. (N. Y.) 520.

<sup>40</sup> Beckwith v. Boyce, 9 Mo. 560.

<sup>41</sup> Ames v. Trenton Brewing Co., 56 N. J. Eq. 309, 38 Atl. Rep. 858; Berger v. Hoerner, 36 Ill. App. 360. "The genius and enterprise of the last half century have been in nothing more remarkable than in the employment of some of the great agents of nature, by means of machinery, to an infinite variety of purposes for the saving of human labor. Hence, there has arisen in our country a multitude of establishments for working in cotton, wool, wood, iron and marble; some under the denomination of mills and others of factories, propelled generally by water power, but sometimes by steam. These establishments have, in many instances, perhaps

in most, acquired a general name, which is understood to embrace all these essential parts, not only the building which shelters, incloses, and secures, the machinery, but the machinery itself. Much of it might be easily detached, without injury to the remaining parts, or to the building but it would be a very narrow construction which would exclude it from passing by the general name by which the establishment is known, whether of mill or factory. The general principles of law must be applied to new kinds of property, as they spring into existence in the progress of society, according to their nature and incidents, and the common sense of the community. The law will take notice of the mutations of language and the meaning of new terms, applied to new objects, as they arise. In other words, it will understand words used by parties in their contracts, whether executed or executory, whether in relation to real or personal property, according to their ordinary meaning or

**§ 738. Machinery and mechanical apparatus as trade fixtures.** Machinery and mechanical appliances which have been placed by the tenant in the demised building and which are necessary to enable him to use the premises for the purposes for which they have been leased by him, usually remain his personal property. The rule as to machinery as between landlord and tenant is construed very liberally in favor of the tenant. According to the modern cases if machinery owned by the tenant is found attached to the leased premises it is presumed to be the tenant's and not the landlord's property in the absence of proof to the contrary. Of course, in this as in all cases of fixtures the intention is controlling. The manner in which the machinery is annexed and attached to the premises, while material is never conclusive.<sup>42</sup> The above rules have been applied to the cotton gin<sup>43</sup> and to a boiler house and other structures used in connection with an electric light plant,<sup>44</sup> to copper stills, kettles, steam tubs and other machinery employed in a distillery<sup>45</sup> to machinery placed in a sugar refinery by a tenant<sup>46</sup> or in a factory erected by the tenant,<sup>47</sup> to machinery in a steam flour mill,<sup>48</sup> to machinery placed in the premises by an electric light company,<sup>49</sup> to a steam engine and machinery with boxes and necessary appliances used for hoisting coal from the mine,<sup>50</sup> to a hydraulic press let into the ground and walled in by solid masonry,<sup>51</sup> to an engine and boiler placed in the building in such a manner that they may be removed without damage to the structure.<sup>52</sup> So it has been held that a portable engine and a sawmill which were used by a tenant for the purpose of sawing logs and which had

acceptation." By the Court in  
Farrar v. Stackpole, 6 Me. 157.

<sup>42</sup> Cherry v. Arthur, 5 Wash. 787, 32 Pac. Rep. 744; Chase v. Tacoma Box Co., 11 Wash. 377, 382, 39 Pac. Rep. 639.

<sup>43</sup> Math v. Levy, 74 Miss. 450, 21 So. Rep. 9.

<sup>44</sup> Brown v. Reno Electric L. & Power Co., 55 Fed. Rep. 229.

<sup>45</sup> Reynolds v. Shuler, 5 Cow. (N. Y.) 323; Moore v. Smith, 24 Ill. 512; Pillow v. Love, 6 Tenn. 109.

<sup>46</sup> Cook v. Folsom (Pa.), 2 Lanc. Law Rev. 185.

<sup>47</sup> *In re Welch*, 108 Fed. Rep. 367.

<sup>48</sup> McGreary v. Osborne, 9 Cal. 119.

<sup>49</sup> Havens v. West Side Electric Light Co., 17 N. Y. Supp. 580; affirmed in 49 N. Y. St. Rep. 771, 20 N. Y. Supp. 764, 60 N. Y. St. Rep. 874, 29 N. Y. Supp. 1085, 143 N. Y. 632, 37 N. E. Rep. 827.

<sup>50</sup> Dobschuetz v. Halliday, 82 Ill. 371.

<sup>51</sup> Finnely v. Watkins, 13 Mo. 291.

<sup>52</sup> Conde v. Lee, 55 App. Div. 401, 67 N. Y. Supp. 157, 101 N. Y. St. Rep. 157.

no connection with the ordinary use of the land as a farm, may be removed by the tenant as his property.<sup>53</sup> So also a steam engine which was put into the demised premises for the tenant who used the premises as a fixture to take the place of an old engine which had become dangerous and was removed by the tenant is personal property of the tenant though the landlord expressly stipulated that the new engine would only be put in place of the old one upon the condition that it should belong to him, and the lease containing a covenant that the tenant was not to make any alterations without the consent of the landlord and the tenant called upon the landlord to replace the unsafe boiler with one that was safe. The landlord having refused to do this the tenant did it himself and the court, despite the fact that the landlord insisted that the new engine should belong to him, gave judgment for the tenant upon the ground that he never assented to the demand of his landlord and that the replacing of the old engine by a new one was of such paramount necessity that the tenant's title to it should remain unimpaired.<sup>54</sup> As regards the tenant's machinery it may finally be said that while actual attachment to the freehold is not always decisive it may always be considered. The nature of the chattel and its adaptation to the purpose for which it is to be used are usually of more weight than the matter of physical annexation. There is a vast difference between movable machines owned by the tenant on the premises but not fastened to them or at the most merely screwed to the floor and whose number and permanency are contingent upon the fluctuating condition of the business and which are liable to be taken in and out as exigencies may require and steam engines, boilers and shaftings and other articles secured by masonry and which are indispensable to the use of the premises for any purpose.<sup>55</sup> This difference is accentuated in a case where the question of fixtures arises between mortgagor and mortgagee. In such a case the mortgage of the premises would unquestionably not include loose articles of machinery used in the premises but not physically annexed or attached to them while on the other

<sup>53</sup> Hughes v. Edisto Cypress Shingle Co., 28 S. E. Rep. 2, 51 S. Car. 1. 44 N. Y. St. Rep. 548, affirming 55 Hun, 494, 29 N. Y. St. Rep. 548.

<sup>54</sup> Andrews v. Day Button Co., 132 N. Y. 348, 30 N. E. Rep. 831, Eq. 497.

<sup>55</sup> Rogers v. Brokaw, 25 N. J.

hand it might include machinery attached to the premises and which was necessary for the use of the building for the purpose for which it was intended.<sup>56</sup>

**§ 739. Domestic fixtures.** Domestic fixtures of a tenant are articles that have been annexed by him to a dwelling house to render his use and occupation of the same more comfortable or more convenient. They are divided into two classes; the useful fixture and the ornamental fixture. The tenant may usually remove domestic fixtures which have been attached by him to a dwelling house or grounds providing that their removal does not result in material injury to the premises.<sup>57</sup> The doctrine of domestic fixtures is older perhaps than that of trade fixtures having been recognized in some of the year books,<sup>58</sup> but it has not been as extended or as inclusive in its application as the rule relative to trade fixtures.<sup>59</sup> Many articles of a somewhat bulky nature used in connection with a dwelling house have been regarded as domestic fixtures. Thus, a pump erected by a tenant during his term and very slightly affixed to the land was held to be a removable fixture.<sup>60</sup> And among other articles, hangings, tapestries and pier glasses, whether nailed to the walls or to panels, or put up in the place of panels,<sup>61</sup> cornices,<sup>62</sup> marble and other ornamental chimney pieces,<sup>63</sup> marble slabs affixed to the wall,<sup>64</sup> wooden wainscoting fastened to the walls by screws,<sup>65</sup>

<sup>56</sup> Farmers' Loan & Trust Co. v. Minneapolis E. & M. Works, 35 Minn. 543, 29 N. W. Rep. 349; Hill v. Wentworth, 28 Vt. 429; Keeler v. Keeler, 31 N. J. Eq. 181; Case Mfg. Co. v. Garven, 45 Ohio St. 290, 13 N. E. Rep. 493.

<sup>57</sup> Wright v. Du Bignon, 114 Ga. 765; 40 S. E. Rep. 477; Lawton v. Lawton, 3 Atk. 13; *Ex parte* Quincy, 1 Atk. 477; Elwes v. Mawe, 3 East 38; Poole's Case, 1 Salk, 369; Herlakin's Case, 4 Coke, 64; Cave v. Cave, 2 Vern, 508; Harvey v. Harvey, 2 Stra. 1141; Lee v. Risden, 7 Taunton, 191; Snedecker v. Warring, 12 N. Y. 170; McCracken v. Hall, 7 Ind. 30.

<sup>58</sup> Day v. Austin, Owen, 70; Day v. Bisbitch, Cro. Eliz. 374.

<sup>59</sup> C. J. Dallas, in Buckland v. Butterfield, 2 Brod. & B. 54.

<sup>60</sup> Grymes v. Boweren, 6 Bing. 437.

<sup>61</sup> Squier v. Mayer, 2 Freem, 249; Beck v. Rebow, 1 P. Wms. 94; Elwes v. Maw, 3 East 38, 53; Buckland v. Butterfield, 2 Brod. & B. 54.

<sup>62</sup> Avery v. Cheslyn, 3 Ad. & El. 75.

<sup>63</sup> Lawton v. Lawton, 3 Atk. 13, 15; Lawton v. Salmon, 1 H. Black. 260; Allen v. Allen, Moseley, 113.

<sup>64</sup> Allen v. Allen, Moseley, 112.

<sup>65</sup> Lawton v. Lawton, 3 Atk. 13, 15; *Ex parte* Quincy, 1 Atk. 477;

grates, ranges and stoves fastened to the brick work of the building,<sup>66</sup> iron chimney backs,<sup>67</sup> wash tubs and other apparatus fastened to the house, coffee mills and other mills,<sup>68</sup> cupboards and closets which can be easily removed,<sup>69</sup> bookcases, clockcases, either standing on brackets or screwed to the wall,<sup>70</sup> and similar articles have been regarded as fixtures of a domestic character.<sup>71</sup> But in all such cases it is necessary that these things should be removed with little or no injury to the premises or to the articles themselves. Thus, a furnace which was so placed in a house that it could not be removed without materially disturbing the brick work in that portion of the house in which it was placed and without causing a portion of the wall to fall is not a removable fixture.<sup>72</sup> So where a lessee put a steam heating plant into the premises which was permanently attached to it, as between him and the lessor it will be regarded as a permanent fixture. It was so held where the boiler which supplied the steam was set in a foundation of brick and cement on a solid floor, incased in masonry and was screwed to steam pipes running through the floors. The steam pipes connected with radiators resting on one of the floors and to the radiators automatic air valves were attached.<sup>73</sup> In all such cases where the tenant removes domestic fixtures he must do so with as little injury as possible and where the injury done is more than insignificant he must repair and restore the premises to their original condition. Thus an electric chandelier annunciator and similar apparatus attached to a dwelling house by a tenant for his own convenience are domestic fixtures which can be readily detached without material injury to the premises and they may therefore be removed by the tenant in the absence of any agreement to the contrary at any time during the term and even afterwards if he is deprived of an opportunity to remove them during the term by a wrongful taking possession of the premises by the landlord.<sup>74</sup>

Ld. Dudley v. Ld. Warde, Amb. (1751) 113; Lee v. Risdon, 7 Taunt. 189, 191; Rex v. St. Dunstan, 4 B. & C. 686.

<sup>67</sup> Harvey v. Harvey, 2 Stra. 1141.

<sup>68</sup> R. v. London-thorpe, 6 T. R. 379.

<sup>69</sup> Rex v. St. Dunstan, 4 B. & C. 686.

<sup>70</sup> Birch v. Dawson, 6 C. & P. 658.

<sup>71</sup> Main v. Schwartzwaelder, 4 E. D. Smith (N. Y.) 273.

<sup>72</sup> Pond & Hasey Co. v. O'Connor, 70 Minn. 266, 73 N. W. Rep. 159.

<sup>73</sup> Raymond v. Strickland, 124 Ga. 504, 52 S. E. Rep. 619.

**§ 740. Farming fixtures belonging to tenants.** The common law right of tenants existing in the case of trade fixtures, was not extended to tenants of farm lands, to enable them, as matter of strict right, to remove articles of personal property which they had attached to the land solely for the purpose of farming. This was true though the removal of the articles would not cause any injury to the land. Hence, the tenant of a farm who places on the farm at his own expense and to enable him the more conveniently to cultivate it, a stable, or a barn or house for the storage of grain, vegetables or fuel, or a building in which to place his carts or wagons, or a house to shield an engine cannot remove them at the end of the term. Nor can he remove them during the term, though there are no proofs that the removal would injure the premises. For the courts in a leading case drew a very clear distinction between the annexation of chattels to the land for the purpose of trade and the annexation of chattels for the purpose of farming.<sup>75</sup> The rule as just stated in relation to farm fixtures is well supported by the English cases, but the American authorities, from a very early date, have shown a strong tendency to depart from it and place farm fixtures under the same rule as trade fixtures. This departure was based on the fact that when the law of farm fixtures came before the consideration of the American courts the country was practically a wilderness and a different rule was required by circumstances from that which had prevailed in England where farms had been cultivated on leases for centuries. The policy of the courts was to protect and induce the cultivation and improvement of the vacant soil, and it was assumed that the interest of the owner of the land, as well as that of the tenant, would be advanced by any rule that would encourage the tenant to devote himself to improving the land. The circumstance that any structure, however extensive, which the tenant would erect on the land hired by him would immediately become the property of the

<sup>75</sup> Elwes v. Maw, 3 East 38, 2 Smith, L. C. 128, 144 (4th ed.); Williams v. Williams, 12 East, 209. In Elwes v. Maw, 3 East 38, 2 Smith L. C. 128, which is a leading case on the subject, it was said, "But no adjudged case has yet gone the length of establish-

ing that buildings subservient to purposes of agriculture, as distinguished from those of trade, have been movable by an executor of a tenant for life, nor by the tenant himself who built them during the term."

landlord would most effectually prevent the tenant of wild land from improving it. If the humble tenant on opening land before uncultivated knew that the log cabin or barn which he placed upon the land ceased to be his property the moment it was built, he would hesitate a long time, not only to improve the land which he had leased, but also to take land on a lease. At first the land, particularly in the Eastern States, was leased for long terms of years by reason of which the necessity for applying the rule of trade fixtures to farm fixtures was not so apparent; but when later on long leases of farm land were forbidden the urgency of a demand for a new rule was such that the courts were bound to recognize it.<sup>76</sup> But it has been held, however, that fences erected by tenants on the land a part of the farm itself passes to the landlord and the tenant has no right to remove them at the end of the term.<sup>77</sup> But a tenant who used old rails which had fallen down and which had been removed for fuel under an agreement in his lease that he could take fire wood "from fallen trees or dead wood" is not liable to the landlord.<sup>78</sup> So a tenant may remove rails which he has built into a fence where he is expressly authorized to do so by an agreement contained in the lease.<sup>79</sup> Though a tenant of farm land cannot remove articles of personal property which he has annexed to the land for the purpose of cultivation, he will be permitted to remove fixtures which he has placed upon the land for trade purposes not included within the cultivation of the land. The distinction which is made between trade fixtures and farm fixtures in the case of the tenant of farm land, is a very fine one and in the highest degree fanciful. Practically, there is no difference between them, for the fixtures which the tenant places upon his land to enable him to cultivate his farm are as much his trade fixtures as the ma-

<sup>76</sup> *Van Ness v. Pacard*, 2 Pet. (U. S.) 137.

<sup>77</sup> These cases have some bearing, *Smith v. Carroll*, 4 Greene (Iowa) 146; *Goodrich v. Jones*, 2 Hill (N. Y.) 142; *Glidden v. Bennett*, 43 N. H. 306; *Ripley v. Page*, 12 Vt. 353; *Rowan v. Anderson*, 33 Kans. 264; *Ropps v. Barker*, 4 Pick. (Mass.) 239; *Mitchell v. Billingsley*, 17 Ala. 391; *Emrich v.*

*Ireland*, 55 Miss. 390, none of them are cases of landlord and tenant.

<sup>78</sup> *Fullington v. Goodwin*, 7 Vt. 641.

<sup>79</sup> *Mott v. Palmer*, 1 N. Y. 564. But a tenant cannot fell or remove fruit trees though planted by him. *Wyndham v. Way*, 4 *Taunt*, 316.

chinery in a factory. In reference to the trade fixtures of a tenant it has been held that a dairyman might be permitted to remove a barn on the farm he had leased because it was a fixture necessary for his trade as a dairyman and not because it was an agricultural fixture. So tenants of farm lands have been permitted to remove cider mills,<sup>80</sup> mills used by them for preparing timber for sale,<sup>81</sup> machinery for working mines,<sup>82</sup> and gristmills and other similar mills. One who leases a farm for the purpose of carrying on a nursery of plants or for the purpose of raising trees and plants has been allowed to remove those plants, trees and shrubs which he planted for the purpose of sale.<sup>83</sup> But not the plants, shrubs or trees which he had planted as a part of the cultivation of the land, for as a general rule, as is elsewhere illustrated and explained, trees, shrubs and growing plants are part and parcel of the land belonging to the owner of the land and cannot be cut down by a tenant without the permission of the owner.<sup>83a</sup>.

<sup>80</sup> Holmes v. Tremper, 20 Johns. (N. Y.) 29; Bradley v. Ousterhoudt, 13 Johns. (N. Y.) 404. Compare Wadleigh v. Janvrin, 41 N. H. 503.

<sup>81</sup> Perkins v. Swank, 43 Miss. 349.

<sup>82</sup> Lawton v. Lawton, 3 Atk. 13; Ld. Dudley v. Ld. Warde, Amb. 113.

<sup>83</sup> King v. Wilcomb, 7 Barb. (N. Y.) 263; Penton v. Robarts, 2 East, 88; Miller v. Baker, 1 Met. (Mass.) 27, 33; Wyndham v. Way, 4 Taunt, 316. In Penton v. Robarts, 2 East, 88, where the question was on the right of a tenant to remove buildings, Lord Kenyon said, "Shall it be said that the great gardeners and nurserymen in the neighborhood of London, who expend thousands of pounds in the erection of greenhouses and hothouses, etc., are obliged to leave all these things on the premises when it is notorious that they are even permitted to remove trees, or such as

are likely to become such, by the thousand, in the necessary course of their trade. If it were otherwise, the very object of their holding would be defeated. This is a description of property divided from the realty." In Miller v. Baker, 1 Met. (Mass.) 27 on p. 32 it was said, "The tenant had a right to remove these products, *i. e.* trees, they were to him articles of trade and merchandise, and the right to cultivate them for the purpose of removal, was the extent of his interest in the nursery garden; and, having this species of property, and this restricted interest in the soil, we think he may be allowed to treat them as personal chattels, and to recover their value as against a wrong-doer who should be guilty of a conversion of them, by taking them into his possession and excluding the owner from the lawful exercise of his rights over them."

<sup>83a</sup> In the absence of an agree-

**§ 741. Personal property which is held by a tenant under a conditional bill of sale.** Articles of personal property which had been purchased by a tenant upon condition that the title shall not vest in him until the article is paid for continue to be personal property so far as the landlord is concerned though the articles may be firmly fastened to the premises. This is the rule even though the lease expressly provides that the tenant's improvements shall become the property of the landlord on the termination of the lease.<sup>84</sup> If it is by statute provided the conditional bill of sale shall be recorded as notice, the landlord as against the vendor will have constructive notice of his rights. So the owner of a personal chattel which has been leased to a tenant under an agreement that it shall become his property when paid for and by the tenant affixed to the premises may maintain a bill in equity enjoining interference with the property by the landlord or by the lessee or his assignee where the lessee becomes bankrupt.<sup>85</sup>

**§ 742. Chattels used by a tenant in improving and repairing the premises.** Articles of personal property attached by the tenant to the premises in fulfillment of his covenant to keep the premises in repair and to deliver them to the landlord in the same condition as when rented,<sup>86</sup> or chattels which are annexed or attached to the building by the tenant to take the place of portions of the premises which the tenant has had to remove because of their decayed condition arising from wear and tear are not generally removable by the tenant as fixtures. If the tenant to maintain the demised premises in a habitable condition removes certain integral and essential parts of the same and replaces those removed by others he cannot at the end of the term as against the landlord remove what he has thus placed in the premises. Thus a tenant, who places windows in a wall where no windows had been before, cannot remove the window frames

ment to that effect, a landlord is not liable to a tenant for the value of labor performed in improving the land. *Gray v. Kehoe*, 90 Mich. 151, 46 Atl. Rep. 688.

<sup>84</sup> *Best Mfg. Co., v. Cohn*, (Cal. App. 1905) 86 Pac. Rep. 829.

<sup>85</sup> *Wetherill v. Gallagher*, 60 Atl.

Rep. 905, 211, Pa. St. 306. See also *Cherry v. Arthur*, 5 Wash. 787, 32 Pac. Rep. 744.

<sup>86</sup> *Murray v. Maross*, 27 Mich. 203; see also *Caldwell v. Eneas*, 2 Mill. Const. (S. Car.) 348, 12 Am. Dec. 681.

and sashes and leave in their place unsightly holes.<sup>87</sup> So where the tenant, after removing pillars, partitions, sewers and floors in the demised premises puts others of a much costlier character in their place, he cannot remove the latter as fixtures without the consent of his landlord.<sup>88</sup>

**§ 743. The injury to the premises by the removal.** The injury that may or will be done to the premises by the removal of personal property by the tenant and the value of the article after its removal may be considered in determining whether it is or is not permanently annexed to the freehold. The fact that the removal of the fixture will result in its destruction more or less complete is usually material in determining whether the tenant shall retain his ownership of it. If the destruction may reasonably be expected to be complete because of its removal an almost conclusive presumption is thereby created that no removal was intended by the parties. The strength of this presumption diminishes according to the degree in which a chattel may be preserved from destruction during the process of its removal. These circumstances while they are relevant to show the intention of the parties to the lease as to the character of the fixture itself are never absolutely decisive.<sup>89</sup> The question whether chattels attached to the freehold are or are not real or personal property is

<sup>87</sup> *State v. Elliott*, 11 N. H. 540; but see *contra* as to the tenant's right to remove sashes in windows already existing. *State v. Whitener*, 93 N. C. 590.

<sup>88</sup> *Felcher v. McMillan*, 103 Mich. 494, 61 N. W. Rep. 791. In this case the tenant removed a cement floor and put down another of so-called tile much more expensive. New partitions were put in which if removed would leave the premises open to the street. Marble slabs were put in urinals, and closets were laid. Everything including the bar, partitions, tiling and a refrigerator was imbedded in cement and would be valueless if removed. The court said, "The lessees chose to remove the pillars, the partitions, the sewers,

the cement floor and to replace them by others which they considered better suited to their business. If they chose to replace wooden pillars with iron ones, plate-glass fronts and partitions with refrigerators and mirrors solidly built in the partition walls, and to take up the sewers and floors, and replace them with others better and more expensive, the new ones did not become trade fixtures, subject to removal by the tenant. The law does not permit tenants to remove fixtures which are built into the building and become a part of it."

<sup>89</sup> *Filley v. Christopher*, 39 Wash. 22, 80 Pac. Rep. 984; see also *Felcher v. McMillan*, 103 Mich. 494, 61 N. W. Rep. 791.

in all instances regulated by the intention of the parties. This intention need not be expressed in the contract of lease itself but may be evidenced by a separate agreement, or it may be implied from the circumstances of the case such as the character and use of the premises, the character of the chattels and from similar circumstances.<sup>90</sup> But generally where the removal by the tenant of the personal chattels which he has annexed to the premises would result in leaving the premises in a worse condition at the end of the term than they were before the alterations or improvements were made, he will not be allowed to remove them in the absence of an express stipulation to that effect.<sup>91</sup> Thus a new staircase built in the premises by a tenant which takes the place of an old staircase removed by him is an irremovable fixture.<sup>92</sup> The tenant must employ ordinary care in removing his chattels from the premises. Where the lease gives the tenant a right to put machinery on the premises, and to remove it at the end of his term, he is not liable for such necessary damage as may happen on his removing the machinery with proper care.<sup>93</sup> A covenant on the part of a lessee binding him to keep the premises in good repair without excepting wear and tear or any other cause of dilapidation will be construed so as to prevent him from removing new machinery and other chattels which had been placed in the premises by him to take the place of similar articles removed and disposed of by the tenant or which have been worn out.<sup>94</sup>

<sup>90</sup> *Lynn v. Waldron*, 36 Wash. 82, 80 Pac. Rep. 292.

<sup>91</sup> *Friedlander v. Ryder*, 30 Neb. 783, 47 N. W. Rep. 83, 9 L. R. A. 700.

<sup>92</sup> *Bovet v. Holzgraft*, 5 Tex. Civ. App. 141, 23 S. W. Rep. 1014.

<sup>93</sup> *Hunt v. Potter*, 47 Mich. 197. "We do not" said the court in *Friedlander v. Ryder*, 30 Neb. 783, on p. 789, "deny the right to remove this addition on the ground that it was attached to the freehold but because the improvement was of such a character and was so annexed to the main building that its removal would greatly injure

the demised premises. The modern decisions are to the effect that a tenant can only remove such improvements created by him, the removal of which will not materially injure the premises or put them in a worse condition than they were in when he took possession."

<sup>94</sup> *Ashby v. Ashby*, 59 N. J. Eq. 536, 46 Atl. Rep. 528. "The right of the tenant to remove trade fixtures may doubtless be qualified by the covenants in the lease, but we are of the opinion that the covenant to deliver up in good order all future erections or ad-

**§ 744. The necessity for removing fixtures during the term.** The right of the tenant to remove fixtures placed by him upon the premises for purposes of trade must generally, but not universally, be exercised by him during the existence of the term and while the tenant is in possession of the premises unless by an express agreement with the landlord the tenant has a right to remove the fixtures after he has abandoned the premises.<sup>95</sup> If therefore the tenant abandons the premises during the term, or promptly on the expiration of the lease surrenders the possession to the landlord he will be presumed to have thereby renounced his right to remove his fixtures and they will then be regarded as being the property of the landlord.<sup>96</sup> While the

ditions to or upon the premises is limited in purpose and effect to new buildings erected or old buildings added to (putting such erections and additions upon the same footing in respect of the obligation to keep in repair, as the buildings upon the premises at the time of the execution of the lease) and can not be extended so far as to deprive the tenants of the right to remove trade fixtures, much less personal property, put by them upon the premises during the term." By Gray, J. in *Holbrook v. Chamberlain*, 116 Mass. 155.

<sup>95</sup> *Beers v. St. John*, 16 Conn. 322; *Hughes v. Ford*, 15 Colo. 330, 25 Pac. Rep. 555; *Dostal v. McCaddon*, 35 Iowa 318; *Stockwell v. Marks*, 17 Me. 455, 35 Am. Dec. 266; *Dingley v. Buffum*, 57 Me. 381; *Vorse v. Des Moines Marble & Mantel Co.* 104 Iowa 541, 73 N. W. R. 1064; *Bush v. Havird*, 12 Idaho 352, 86 Pac. Rep. 529; *Stokoe v. Upton*, 40 Mich. 581, 29 Am. Dec. 560; *Weathersby v. Sleeper*, 42 Miss. 732; *Gaffield v. Hapgood*, 17 Pick. Mass. 192, 28 Am. Dec. 290; *Smith v. Park*, 31 Minn. 70, 16 N. W. Rep. 490;

*Bircher v. Parker*, 43 Mo. 443, 451; *Walsh v. Sichler*, 20 Mo. App. 374; *Williams v. Lane*, 62 Mo. App. 66, 1 Mo. App. Rep. 723; *Free v. Stuart*, 39 Neb. 220, 57 N. E. Rep. 991; *Fuller v. Brownell*, 48 Neb. 145, 67 N. W. Rep. 6; *Freidlander v. Ryder*, 30 Neb. 783, 47 N. W. Rep. 83; *Torrey v. Burnett*, 38 N. J. Law 457, 20 Am. Rep. 421; *King v. Wilcomb*, 7 Barb. (N. Y.) 263; *Ombony v. Jones*, 19 N. Y. 234, 238; *Haflick v. Stober*, 11 Ohio St. 482; *Bates v. Hoski*, 6 Ohio Dec. 1064, 10 Am. Law Rev. 52; *Davis v. Ross*, 38 Pa. St. 346; *Forbus v. Watkins*, (Tenn. Ch. 1901) 62 S. W. Rep. 36; *Fitzgerald v. Anderson*, 81 Wis. 341, 51 N. W. Rep. 554; *Krouse v. Ross*, 14 Fed. Cases 7939, 1 Cranch C. C. 338; *Rutter v. Smith*, 2 Wall. (U. S.) 491; *Lee v. Risdon*, 7 Taunt. 188, 191; *Colegrove v. Dios Santos*, 2 Barn. & Cress. 76; *Lyde v. Russell*, 1 Barn & Ald. 394.

<sup>96</sup> *Marks v. Ryan*, 63 Cal. 107; *Youngblood v. Enbank*, 68 Ga. 630; *Cromie v. Hoover*, 40 Ind. 49; *Hedderich v. Smith*, 103 Ind. 203, 2 N. E. Rep. 315; 53 Am. Rep. 509; *Thomas v. Grant*, 5 Bush. (Ky.) 142; *Dair v. Buffum*, 51 Me.

general rule is that the tenant must remove the articles of personal property which belong to him during the term there are some cases which concede to him the right to remove them after the term shall have come to an end, provided he is still in the possession of the premises. If the tenant continue in the possession and occupancy of the demised premises after his term shall have expired, and this possession is based upon his rights as a tenant under the lease which has expired, he retains the right to remove his personal property which he had while the lease was running. The fact that he is still in possession has been said to be sufficient to rebut any presumption that he has abandoned the fixtures to the landlord which would arise where his lease, having come to an end, he had surrendered possession to the landlord.<sup>97</sup> Thus where a tenant on the termination of a lease abandons an engine and boiler set in brick work and three months thereafter it was purchased on a sale under an execution against the tenant it was held that the engine and boiler had by

160; *Shepard v. Spaulding*, 4 Met. (Mass) 416; *Loughran v. Ross*, 45 N. Y. 792, 6 Am. Rep. 173; *Sampson v. Camperdown Mills*, 64 Fed. Rep. 939. A tenant may remove fixtures which he has put on leased premises at any time during his lease, or while he continues tenant, but after the expiration of the lease, and the surrender of the premises to the landlord, he cannot enter on the premises and remove any fixtures, for when he quits the premises, leaving his fixtures behind him, it will be presumed he intended to abandon them. *Child v. Hurd*, 32 W. Va. 66, 9 S. E. Rep. 362.

<sup>97</sup> *Chalifonk v. Potter*, 113 Ala. 215, 21 So. Rep. 322; *Berger v. Hoerner*, 36 Ill App. 360; *Central Branch R. Co. v. Fritz*, 20 Kan. 430, 437, 27 Am. Rep. 175; *Commissioners of Rusk Co. v. Stubbs*, 25 Kan. 322; *Davidson v. Crump Manuf. Co.*, 99 Mich. 501; *Turner v. Kennedy*, 57 Minn. 104, 58

N. W. Rep. 823; *Smith v. Park*, 31 Minn. 72, 16 N. W. Rep. 470; *Kuhlman v. Meier*, 7 Mo. App. 260; *Waters v. Reuber*, 16 Neb. 99, 19 N. W. Rep. 687, 49 Am. Rep. 110; *Donnelly v. Frick & Lindsay Co.*, 207 Pa. St. 524, 56 Atl. Rep. 597; *Ombony v. Jones*, 19 N. Y. 234; *Meader v. Brown*, 5 N. Y. St. Rep. 839; *Bernheimer v. Adams*, 70 App. Div. 114, 75 N. Y. 93; *Lewis v. Ocean Navigation etc., Co.*, 125 N. Y. 341, 26 N. E. Rep. 301, 34 N. Y. St. Rep. 973, affirming 51 Hun. 644, 3 N. Y. Supp. 911; *Eldridge v. Hoefer*, 45 Oreg. 239, 77 Pac. Rep. 874, 876; *Shellar v. Shivers*, 171 Pa. St. 569, 33 Atl. Rep. 95, 96; *Potter v. Gilbert*, 177 Pa. St. 159, 35 Atl. Rep. 597, 35 L. R. A. 580; *Wright v. McDonell*, 88 Tex. 140, 30 S. W. Rep. 407; *Gartlan v. Hickman*, 56 W. Va. 75, 49 S. E. 14, 19; *Wheeton v. Woodcock*, 7 Mee. & Wel. 14; *Penton v. Robart*, 2 East.

the abandonment become a part of the realty and that the landlord might claim them as against the purchaser.<sup>98</sup> The lessor, by entering into negotiations after the term is ended for the purchase of trade fixtures which the lessee has a right to remove may be presumed to have consented that the lessee shall have a reasonable time to remove his fixtures. Nor can he where near the end of the term he has begun negotiations for the purchase of the tenant's fixtures prevent the lessee from removing buildings after the end of the term where the negotiation failed about the end of the term.<sup>99</sup> So where by an express stipulation in the lease the tenant has a right to remove improvements erected by him it has been held that he has a reasonable period after the term has expired to remove them. He is however confined during that time to the rights of ingress and egress and he cannot retain possession on that account.<sup>1</sup> The law does not demand impossibilities and in cases where the tenancy is of uncertain duration, or is liable to be terminated by the happening of some uncertain or contingent event, or where it can be terminated at any time by the option of the landlord, the tenant will have a reasonable time after the actual expiration of the lease to remove his fixtures. Now a reasonable time is not a fixed period. What would be a reasonable time in one case would not be a reasonable

<sup>98</sup> Donnewald v. Turner Real-Estate Co., 44 Mo. App. 350.

<sup>99</sup> Merriam v. Ridpath, 16 Wash. 104, 47 Pac. Rep. 416.

<sup>1</sup> Caperton v. Stege, 91 Ky. 351, 16 S. W. Rep. 84, affirming 15 S. W. Rep. 870; *contra* Franklin Land, Mill & Water Co. v. Card, 84 Me. 528, 24 Atl. Rep. 960, when the tenant has erected improvements which the landlord has agreed to pay for. The right to enjoy the use of the fixtures during the term and to remove them at its expiration will be denied if the tenant is compelled to remove his fixtures during the term. His right to occupy the premises during the term will be sensibly abridged if he has to remove his fixtures before its end. On the

other hand to refuse to allow the tenant a reasonable time after the end of the term within which to remove his fixtures is practically to deny him his right to remove them at all. It is clear he cannot usually remove his fixtures at the precise moment the lease expires. The right to remove fixtures within a reasonable time after the lease expires arises therefore by implication and to promote the ends of justice. The implication goes no farther. Hence it will not be implied that the tenant shall have the right to occupy the premises after the term has expired while he is removing his fixtures. Caperton v. Stege, 91 Ky. 351, 355, 16 S. W. Rep. 84.

time in another, so that, in every case, the question what is a reasonable time must be determined from facts and circumstances peculiar to that case. The nature of the act to be done, the situation of the parties, the duty or want of duty incumbent upon one to act promptly and the effects of delay upon the rights of the other must be considered.<sup>2</sup> Where, during the lease, the tenant is prevented by an injunction procured by the landlord from removing fixtures which he has a right to remove, he is entitled to a reasonable time after the lease has expired to remove them,<sup>3</sup> even though the tenant is not then in possession of the property.<sup>4</sup> A tenant in possession at the expiration of a lease who has made improvements on the premises which the landlord has agreed to pay for or purchase at the end of the term may retain possession not only of his improvements but also of the premises until the purchase is made being in the meantime chargeable with rent. The tenant is a mortgagee within the contemplation of equity. He has a lien under which he may maintain possession and the landlord has a right to redeem.<sup>5</sup> If the parties to the lease have stipulated that the lessor shall buy at a valuation to be determined by appraisal, or in case they cannot agree upon what the fixtures are reasonably worth an arbitration shall be had, and without fault on the part of the tenant an attempt to arbitrate has failed he may remain in possession he will not, under such circumstances being absolutely free from fault be liable for rent while the attempt at arbitration was pending,<sup>6</sup> down to the date of his final removal.

<sup>2</sup> Updegraff v. Lesem, 15 Colo. App. 297, 62 Pac. Rep. 342.

<sup>3</sup> Bircher v. Parker, 43 Mo. 443; Goodman v. Hannibal & St. Joseph Ry. Co. 45 Mo. 33, 100 Am. Dec. 336.

<sup>4</sup> Mason v. Fenn, 3 Peck. (Ill.) 525.

<sup>5</sup> Scruggs v. Railroad, 108 U. S. 368; Holzman v. Abrams, 2 Duer. (N. Y.) 435; Franklin Land, etc., Co. v. Card, 84 Me. 528, 24 Atl. Rep. 960.

<sup>6</sup> Vorse v. Des Moines Marble & Mantel Co., 104 Iowa, 541, 73 N. W. Rep. 1064. In New York under Code C. P. §2253, the issu-

ance of a warrant for the removal of a tenant in a summary proceedings cancels the lease and annuls the relation of landlord and tenant and the latter will not thereafter be permitted to enter to remove his trade fixtures though his lease conferred on the tenant a right to remove fixtures if all the covenants of the lease were fully performed. Van Vleck v. White, 72 N. Y. Supp. 1026. If the tenant having placed buildings or machinery or other personal property upon the premises during the term, which would be deemed a part of it as between grantor and

**§ 745. Exception to the rule that fixtures must be removed during the term.** An exception to the rule stated in the preceding section must obviously be recognized in a case where the tenancy is of an uncertain duration as for example

grantee, surrenders the possession to his landlord at the end of the term, without removing his personal chattels or without obtaining the right to remove them after the surrender he will be presumed to waive his right to remove the same, and they become the property of the landlord. This presumption, however, may be removed by evidence. The presumption is that the tenant intends either that the personal property shall be a gift to the landlord, or that he waives his rights to re-enter. It is therefore a question of the intention of the parties and if there is evidence which clearly shows that there was no intention on the part of the tenant either to convey the title to the personal property, or to waive his right to re-enter, and there is at the same time evidence showing that the landlord knew and understood such to be the intention of the tenant and promises him that he might remove them after the term, the presumption will be set aside. There must be, however, proof of the consent of the landlord to the right of removal by the tenant; a mere declaration on the part of the latter that he does not waive his rights, is not sufficient where he has surrendered the premises without removing the fixtures. But if the landlord promises the tenant that he may have a certain time after the term within which to remove his fixtures, the license would be

valid, and would prevent the title of the fixtures vesting in the landlord. Stipulating such as these are given and are frequently enforced. *Second National Bank v. O. E. Merrill Co.*, 69 Wis. 501, 512, 511, 513, 34 N. W. Rep. 514; *Fitzgerald v. Anderson*, 81 Wis. 341, 342, 51 N. W. Rep 554.

"It is true that modern decisions have in the interest of trade greatly enlarged the number of movable trade fixtures, but they agree with the earlier authorities, in limiting the time within which the removal must take place. They hold that the interest which a tenant has in his fixtures, consists in the right or privilege of removing them, and reducing them to personal chattels, and that this is a right or privilege which may be lost by not being exercised in due time or may be voluntarily surrendered, abandoned, or waived. The position sustained by the overwhelming weight of authority, both English and American, and ancient and modern is that where a tenant quits possession or surrenders the premises unqualifiedly to his landlord without removing or reserving his fixtures, he is understood to make a dereliction of them to his landlord, and a few cases in which the right of property in fixtures has been held to remain unchanged after the termination of the tenancy and surrender of possession of the premises by the tenant rest upon the particular attendant circum-

where it is liable to be determined by the happening of some contingent event as by the death of the tenant or by a similar incident; and, *a fortiori*, where the tenancy may be determined with or without notice by the will of the landlord or tenant as in the case of a lease at will. Under such circumstances the presumption of an abandonment or a gift by the tenant to his landlord of the fixtures which arises from his leaving them on the premises after he has surrendered the premises to the landlord at the end of his term can not be recognized or admitted to exist until the tenant has had a reasonable time allowed him after the term has ended to remove his fixtures.<sup>7</sup> So the fact that a tenant holds over after his term has expired without taking a new lease has by some authorities been regarded as of sufficient force to rebut the presumption that he meant to waive his rights to remove his fixtures by his failing to remove them during the term.<sup>8</sup> So long as he remains in possession in the character of a tenant though he is holding over after his term has expired, he may, according to the current of the cases, remove his fixtures.<sup>9</sup> But by some of the cases the rule that a tenant at will or the personal representatives of a life tenant may remove fixtures after the expiration of the tenancy, has been confined strictly to those fixtures which the tenant or his personal representative may remove as matter of right under the general rules of law and not to apply to fixtures which are removable by contract between the parties to the lease. For inasmuch as a tenant for life cannot by a contract with his lessee bind the remainderman, the lessee of the life tenant cannot, on the death of the life tenant, claim to remove fixtures as against the remainderman unless under the law and aside from his contract with his lessor he might

stances, and they may be regarded as exceptional and they do not invalidate the general rule." By the Court per Miller, J. in Carlin v. Ritter, 68 Neb. 476, 477, 486, 487.

<sup>7</sup> Haflick v. Stober, 11 Ohio St. 482, 485; Lawton v. Lawton, 3 Atk. 13; Watriss v. Nat. Bank, 124 Mass. 571; Antoni v. Belknap, 102 Mass. 193; Loughran v. Ross, 45 N. Y. 792; Sullivan v. Carberry,

67 Me. 531; Cooper v. Johnson, 143 Mass. 108; Martin v. Roe, 7 E. & B. 236.

<sup>8</sup> Ombony v. Jones, 19 N. Y. 234, 239; Penton v. Robart, 2 East. 88.

<sup>9</sup> Lewis v. Ocean Nav. & Pier Co., 125 N. Y. 341, 351, 26 N. E. Rep. 301; affirming 51 Hun, 144, 3 N. Y. Supp. 911; Finney v. St. Louis, 39 Mo. 177; Neiswanger v. Squier, 73 Mo. 192, 198.

remove them without the consent of the latter.<sup>10</sup> If the lessee of a life tenant may remove fixtures without the consent of the life tenant he may do so after his death. Where the lease provides expressly that the tenant may remove fixtures erected by him "at" or "on" the expiration of the term he is under no compulsion to remove them during the term. He has the right to enjoy the use of the premises, with the added convenience of his fixtures during the whole term down to its last day. To make the tenant remove his fixtures before the end of his term would, in effect, deprive him of the full use and benefit of the premises to which he is entitled under his lease and for which he pays rent. So too "on" or "at" the expiration of the term cannot and does not necessarily mean immediately and precisely the day or hour the term comes to an end. The tenant under such a lease must be allowed a reasonable time after the expiration of the term, depending in each case on the particular circumstances, *i. e.* the character of the premises and the nature of the fixtures themselves, in which to remove them from the land. He cannot however without his landlord's consent retain possession of the premises after his term is at an end solely because he owns the fixtures which are still on the land. He must on his part at once surrender possession while the landlord on his part must allow him for a reasonable period thereafter free and uninterrupted ingress and egress upon the premises to secure his property and to take from it the same.<sup>11</sup> An express agreement by the parties fixing a specified period after the termination of a lease, within which a lessee may or must remove his fixtures, will receive a liberal construction in favor of the tenant. The court will consider that a forfeiture of a right is never to be favored if it can be avoided and, any act on the part of the tenant, which is claimed to constitute a forfeiture of his right to remove fixtures must clearly appear in the proof. Where the lessor has not suffered loss by reason of the delay of the lessee to act, the latter may be indulged and granted a reasonable grace though he has not in fact removed his fixtures within the period men-

<sup>10</sup> *Haflick v. Stober*, 11 Ohio St. 482, 485; *White v. Arndt*, 1 Whart. (Pa.) 91.

<sup>11</sup> *Caperton v. Stege*, 91 Ky. 351, 355, 16 S. W. Rep. 84; affirming

12 Ky. Law Rep. 947, 15 S. W. Rep. 840; *Davidson v. Crump Mfg. Co.*, 99 Mich. 501, 504, 58 N. W. Rep. 475; *Cheatham v. Plinke*, 1 Tenn. Ch. 576, 579.

tioned in the lease.<sup>12</sup> Under a lease which stipulated that the tenant's improvements, shall, at the option of the lessor become the lessor's property at his option but fixes no time within which he shall exercise the option, the lessor should give reasonable notice to the tenant of his intention to claim the improvements. A reasonable notice has been held to be four weeks.<sup>13</sup> Where during the term the landlord by an injunction prevents the tenant from removing fixtures which under the lease the tenant has a right to remove during the term, a strong case exists for allowing the tenant a reasonable time after the lease has expired to remove his fixtures.<sup>14</sup>

**§ 746. Appraisal or arbitration to determine the value of fixtures.** It may be stipulated in the lease that upon its termination the landlord shall purchase from the tenant buildings or chattels which have been erected or placed upon the premises by the tenant during the term and that the purchase price or value of the same shall be determined by appraisers.<sup>15</sup>

<sup>12</sup> Waterman v. Clark, 58 Vt. 601, 606, 2 Atl. Rep. 578; Atkinson v. Dixon, 96 Mo. 588, 10 S. W. R. 162. "The right of a tenant to remove the erections made by him in futherance of the purpose for which the premises were leased, is conceded. The principle which permits it is one of public policy, and has its foundation in the interest which society has that every person shall be encouraged to make the most beneficial use of his property the circumstances will admit of. On the other hand, the requirement that the tenant shall remove during his term, whatever he proposes to claim a right to remove at all, is based upon a corresponding rule of public policy, for the protection of the landlord, and which is that the tenant shall not be suffered, after he has surrendered the premises, to enter upon the possession of the landlord, or of a succeeding tenant to remove fixtures which might and ought to

have been taken away before. A regard for the succeeding interests is the only substantial reason for the rule which requires the tenant to remove his fixtures during the term: indeed the law does not in strictness require of him that he shall remove them during the term, but only before he surrenders possession, and during the time that he has a right to regard himself as occupying in the character of tenant." By the Court in Kerr v. Kingsbury, 39 Mich. 150 on p. 153, 154, 33 Am. Rep. 362.

<sup>13</sup> Isman v. Hanscom, 66 Atl. Rep. 329, 217 Pa. St. 133.

<sup>14</sup> Bircher v. Parker, 43 Mo. 443.

<sup>15</sup> Hood v. Hartshorn, 100 Mass. 117, 121; Avery v. Scott, 8 Exch. 500; Scruggs v. Railroad, 108 U. S. 368; Holsman v. Abrams, 2 Duer. (N. Y.) 435; Franklin Land etc. Co. v. Card, 84 Me. 528; 24 Art. Rep. 960; Bales v. Gilbert, 84 Mo. App. 675; Murphy v. Insurance Co., 61 Mo. App. 323.

It may in some cases be necessary for a court to determine whether the appraisal under a lease of the value of the improvements or fixtures of an outgoing tenant is or is not an arbitration. If the proceedings of the appraisers which are named by the parties under the provision of the lease is an arbitration and not a mere appraisal the sum named by them is in the nature of an award and the validity of their judgment may be examined and determined upon the rules and principles of law regulating arbitrations. Where an arbitration as distinguished from an appraisal is had it is indispensable that a definite time and place shall be fixed for a hearing of which the parties shall receive timely notice in order that they may be present that they may introduce their evidence and make their statements before the arbitrators. The procedure is radically different where it is merely an appraisal. The appraisers may meet and act without any notice to the parties interested and they may act upon their own knowledge of the facts and neither party, in the absence of an express provision to that effect contained in the lease, has any right to appear before them or to introduce evidence of value to guide the appraisers in their deliberations or determinations. The judgment of the appraisers, in the absence of fraud, is conclusive upon the parties to the lease.<sup>16</sup> The appraisers need not be sworn though by a statute arbitrators are required to be sworn<sup>17</sup> in order that their determination may be valid and may be sustained by the courts. Under such a proceeding the value of all permanent improvements may be fixed. An appraisement to determine the value of improvements which are to be paid for by the lessor to the lessee on the termination of the lease is not an arbitration and award. No dispute exists and no issue of fact is to be determined. No hearing need be set for a particular time and place; no notice need be given to the parties; no evidence or argument is to be heard. It is the duty of the appraisers to ascertain the value of the permanent improvements by making a careful examination of them to determine such value by conference and comparison of views and to report what, in their best judgment, the value is. The conclusion of the appraisers reached in this manner is binding on the parties and

<sup>16</sup> Pearson v. Sanderson, 128 Ill. 88, 91, 21 N. E. Rep. 200, affirming 28 Ill. App. 571; Gale, 95 Ill. 533; Stose v. Heisler, 120 Ill. 436.

<sup>17</sup> Pintard v. Irwin, 20 N. J. Law 497

cannot be impeached, except for fraud. No notice of the meeting of the appraisers need be given to the parties to the lease unless expressly required in that instrument. Notice of the time and the place of an arbitration is given to enable the parties to it to present their case by means of evidence and argument. But as the parties are not expected to attend the meeting of the appraisers for deliberation and appraisal no notice to them is necessary unless it is required by the lease.<sup>18</sup> As soon as the appraisers have determined the value of the improvements for which the lessor is bound to pay the lessee according to the terms of the written lease the lessor becomes liable for the amount. Interest begins to run on this amount fixed by the appraisal from the day the lessor is notified how much he has to pay as the notification is equivalent to a demand and the money is due the lessee on that day.<sup>19</sup> Some of the cases however distinguish between a case where the sole duty of the appraisers is to determine value of the premises or of the fixtures under ordinary circumstances which every one would understand and an appraisal under such circumstances as would afford an opening for the existence of a difference of opinion as to what would be the basis of the estimate of the value or a case where the appraisers have to construe the lease itself in making their appraisal. Where the latter is the case the proceedings of the appraisers is an arbitration of which the parties must have notice and an opportunity to be heard and all the rules applicable to arbitrations then may be invoked. The refusal of the appraisers when they are also arbitrators to hear evidence is good ground for setting aside their appraisal or award.<sup>21</sup> So, if the appraisal be regarded as

<sup>18</sup> Norton v. Gale, 95 Ill. 533, 543.

<sup>19</sup> Pearson v. Sanderson, 28 Ill. App. 571; affirmed in 21 N. E. Rep. 200, 128 Ill. 88. The rule of the text as to the mode and effect of an appraisal is also applicable where a lease expressly provides that rent at a certain per cent is to be paid on the appraised value of the premises and their value is to be appraised by persons selected by the parties. Norton v. Gale, 95 Ill. 533, 540. See, also, as sustaining the text,

Luff v. Burrows, 12 East 1; Collins v. Collins, 26 Beav. Ch. 306; Garred v. Macey, 10 Mo. 161.

<sup>20</sup> Ianney, Semple & Co. v. Goehringer, 52 Minn. 428, 431, 54 N. W. Rep. 481; Van Cortlandt v. Underhill, 17 Johns. (N. Y.) 405; reversing Underhill v. Van Cortlandt, 2 Johns. (N. Y.) 339; Smith v. Boston, C. & M. R. Co., 36 N. H. 458.

<sup>21</sup> Van Cortlandt v. Underhill, 17 Johns. (N. Y.) 405; Brown v. Lyddy, 11 Hun (N. Y.) 451, 456;

an arbitration it is usually regarded as invalid and unenforceable if the arbitrators were not sworn.<sup>22</sup> Where a lease expressly stipulates that a price for the fixtures is to be fixed by arbitrators, the tenant should first endeavor justly and with fairness to carry out the contract before resorting to the courts. If, however, without his fault the arbitration fails he will be justified in appealing to the court and the court will then fix the value.<sup>23</sup> The fact that there has been no arbitration however does not alone justify the court in fixing the value. The failure of the appraisers first named by the parties at the end of the term to agree does not give the lessor an immediate title to improvements as soon as the term ends. If the lease provides that the value of the lessee's fixtures as improvements is to be determined by appraisers, to be named by the parties, the latter must attempt in good faith to secure a fair and proper appraisal at the end of the term, or within a reasonable time thereafter. The lessee particularly is bound to do all he can to secure an appraisal which shall be equitable and fair to both parties; and, while he is doing this, a court of equity will refuse to vest the title to his property in his lessor. If one set of appraisers named by the parties to the lease are unable to agree, or if they act in such manner as to render them obviously unfit to determine the value, or if an appraisal once made shall be set aside for fraud other appraisers ought to be promptly appointed by the parties. The plain intent of the parties to have an appraisal must be effectuated if possible. The lessee is not put in default when he continues to designate persons to act as appraisers by the unreasonable refusal of the lessor to name his appraisers. On the other hand he has no cause of action against the lessor for the value of his im-

see Zarkowski v. Astor, 13 Misc. Rep. 507.

<sup>22</sup> Lile v. Barnett, 2 Bibb (Ky.) 166; Overton v. Alpha, 13 La. Ann. 558; Frissel v. Fickes, 27 Mo. 557; Toler v. Hayden, 18 Mo. 399; but see *contra* Day v. Hammond, 57 N. Y. 479, 483; Woodrow v. O'Connor, 28 Vt. 776; Hill v. Taylor, 15 Wis. 190; Otis v. Northrop, 2 Miles (Pa. Dist. Co. Rep.) 350.

Assuming that an appraisal is an arbitration it was held in Brown

v. Lyddy, 11 Hun (N. Y.) 451 that a waiver by the parties to a lease of their right to appear before two appraisers was not a waiver of their right to appear before an umpire selected by the appraisers after they found they could not agree and that an award by the umpire without notice to the lessor and the lessee was voidable.

<sup>23</sup> Bales v. Gilbert, 84 Mo. App. 675.

provements until he has exhausted all reasonable means on his part to secure an appraisal, or it is manifest upon all the facts that no suitable persons can be obtained. Whether a lessee has done all he could have done to procure an appraisal which is required by his lease is a question for the jury in an action by him against the lessor for the value of his improvements.<sup>24</sup>

**§ 747. Meaning of end of the term.** An agreement by a landlord to pay the value of the buildings which the lessee is bound by the lease to erect after the value of the same shall have been appraised "at the expiration of the term;" or at the election of the landlord to grant a renewal of the lease and also providing for the surrender of the buildings in good condition "at the expiration of the term," or sooner, points to the date where the term shall expire by the natural efflux of time. The "term" meant is the time for which the premises are in fact leased and not the estate created by the lease. Hence, even assuming that the covenant to pay the appraised value of the tenant's improvements, was an independent covenant not conditioned upon the payment of rent by the tenant, still the latter could not claim to be re-imbursted for his improvements where the term was ended by a dispossession resulting from non-payment of rent by the tenant years before the term would have otherwise expired. The tenant cannot by his own wrong mature the landlord's liability to pay for improvements and deprive the landlord of a credit or delay for a long period.<sup>25</sup> For a provision that the lessee may remove his fixtures "at the end of his term" should receive a reasonable construction. "*At the end*" of the term means presumptively at the end of the term resulting from its natural expiration through efflux of time and not at the end of a term which is ended by the forfeiture of the lease or the abandonment of the premises by the tenant. But on the other hand a privilege in the tenant to remove his fixtures at the end of the term cannot mean that the tenant must remove them on the instant or even on the same day that the term expires. He ought to have a reasonable time thereafter to do so with a right of ingress and egress to enable him fully to exercise this privilege to his advantage.<sup>26</sup>

<sup>24</sup> *Hood v. Hartshorn*, 100 Mass. 117, 121.      <sup>25</sup> *Davidson v. Crump Manuf'g Co.*, 99 Mich. 501, 58 N. W. Rep.

<sup>26</sup> *Finkelmeier v. Bates*, 92 N. Y. 172, 178.      475.

**§ 748. The lessor's option to renew or pay for the lessee's improvements.** A stipulation by the lessor that, on the expiration of the term, he will either renew the lease or compensate the lessee for his improvements gives the lessor a valid option to compel the tenant to renew or to compensate him which he must exercise within a reasonable period after the end of the term. But it has also been held that time is of the essence of such an option and that a lessor, if he means to renew, must do so on or before the day upon which the lease expires, and that his failure to elect to renew is an abandonment of his right to compel the tenant to renew the lease and constitutes an election on his part to pay for the improvements under the lease. The lessor by so doing binds himself as by an express contract to pay the lessee for his improvements and the lessee may at once enforce this cause of action arising in his favor by an action on the contract.<sup>27</sup> But it is equally well settled that a tenant who is not in default, for rent or otherwise as against a landlord who has covenanted to renew the lease or to pay for the tenant's improvements but who has refused or failed to renew, may continue in the possession and enjoyment of the whole premises until he is paid for his buildings or other improvements.<sup>28</sup> But a tenant who fails to pay his rent according to the terms of the lease cannot enjoin summary proceedings by the landlord based on his failure to pay rent upon the grounds that his landlord is bound on the expiration of the period of the term to re-imburse him for improvements.<sup>29</sup> Under a renewal lease which contains a provision that on its termination the lessor will renew or "pay for buildings erected by the lessee or his representatives" the value to be determined by appraisal the lessee is entitled to a renewal

<sup>27</sup> *Bullock v. Grinstead*, 95 Ky. 261, 269, 24 S. W. Rep. 867. The lessor has an absolute right if he shall so elect to compel the lessee to take a new lease and if he tenders a renewal on the terms named in the lease which the lessee declines to accept the lessor may recover and retain possession of the demised premises without compensating the lessee for his improvements. *Pearce v. Colden*, 8 Barb. (N. Y.) 522.

<sup>28</sup> *Mullen v. Pugh*, 16 Ind. App. 337, 45 N. E. Rep. 347; *Paine v. Rector, etc. of Trinity Church*, 7 Hun (N. Y.) 89, 91; *Holsman v. Abrams*, 2 Duer. (N. Y.) 435; *Van Rensselaer v. Penniman*, 6 Wend. (N. Y.) 569; *Kelso v. Kelly*, 1 Daly (N. Y.) 419; *Wray v. Rhinelander*, 39 How. Pr. (N. Y.) 299.

<sup>29</sup> *Paine v. Rector etc. Trinity Church*, 7 Hun (N. Y.) 89, 92.

or payment for buildings on the land though the buildings were not erected by him during the term but were erected by the tenant under the first lease. So far as the owner of the land is concerned it is of no importance to him in case he has to pay for the buildings whether they were erected by the first or by the second tenant. The fact that the tenant under the earlier lease elected to take a renewal does not vest the title to the buildings in the landlord in the absence of an express contract to that effect. And the case is very much stronger for the second tenant to have the value of his buildings where he does not elect to take a renewal if it be shown that the later tenant took an assignment of the lease from the earlier tenant during the first term.<sup>30</sup>

**§ 749. A landlord's agreement to pay for the fixtures and improvements of the tenant.** In the absence of an express agreement to pay, no recovery can be had by a tenant for improvements made by him, for to entitle a tenant to be paid for improvements by the landlord, there must be a definite and certain agreement to that effect between him and the landlord.<sup>31</sup> Thus, a landlord is not liable to his tenant for the value of labor voluntarily performed by the tenant in clearing off ground and otherwise improving the land in the absence of an express agreement to pay.<sup>32</sup> A covenant by the lessor to re-imburse the lessee for his improvements at the end of the term must be definite and certain, and it must be mutually binding on both the parties to the lease or it will not be enforceable.<sup>33</sup> Subject to these qualifications there can be no question that the right to remove fixtures from the demised premises may be conferred upon the tenant by an express agreement.<sup>34</sup> The parties to the lease may expressly covenant herein that the landlord shall pay the tenant the value of his erections and improvements which have been placed by the tenant upon the premises during the term. And a promise on the part of the landlord to pay the tenant for improvements may be implied from conduct of the landlord which induces the tenant to believe that the value of the improvements which he is placing upon the premises will be paid for by the landlord. But

<sup>30</sup> Wray v. Rhinelander, 39 How. Prac. (N. Y.) 299.

<sup>31</sup> Leslie v. Smith, 32 Mich. 65; Hart v. Hart, 117 Wis. 639, 657, 94 N. W. Rep. 890; Wilkerson v. Farnham, 82 Mo. 672.

<sup>32</sup> Guay v. Kehoo, 70 N. H. 151, 46 Atl. Rep. 688.

<sup>33</sup> Anderson v. Swift, 106 Ga. 748, 32 S. E. Rep. 542.

<sup>34</sup> Merritt v. Judd, 14 Cal. 59, 70.

the mere fact alone that a landlord knows a tenant is about to make permanent improvements and permits him to do so without an express protest or a notification by the landlord that he will not pay for them raises no presumption that he intends to do so.<sup>35</sup> But where a tenant under a lease at will relying upon the fact that those from whom he had received his interest in the land had been in possession for over a hundred years erected very valuable and extensive buildings on the land with the knowledge and express consent of the owner and landlord the latter where he terminates the tenancy at will by notice and ejects the tenant, will be compelled to re-imburse him for the value of the improvements he has made though there may have been no express agreement between the parties to that effect.<sup>36</sup> And the presumption of an implied contract to re-imburse the tenant for improvements is very strong where the term is determined by the will of the landlord. So, generally if a landlord with a fraudulent intention encourage his tenant to make improvements upon the land it is very likely that equity will hold the landlord accountable as a trustee for the tenant for the value of the improvements and compel him to re-imburse his tenant for the improvements and in a case of extreme or outrageous fraud by the landlord may protect and continue the tenant in the possession of the premises for the term which the landlord had encouraged him to expect.<sup>37</sup> So, upon general principles of equity a land-

<sup>35</sup> Gocio v. Day, 51 Ark. 46, 48, 9 S. W. Rep. 433; Oneal v. Orr, 5 Bush. (Ky.) 649.

<sup>36</sup> Lewis v. Effinger, 30 Pa. St. 281, 286.

<sup>37</sup> Kenney v. Browne. 3 Ridgw. P. C. 518; Norway v. Rowe, 19 Ves. 144, 159; Shine v. Gough, 1 Ball. & Beat. 436, 444. The case of Norway v. Rowe, 19 Ves. 144 was the case of a license to work a mine which had been granted and which the grantee parceled out among numerous sub-licensees. One of these upon the abandonment of the mine began to operate it and erected expensive improvements for that purpose. Subsequently the original lessee

or licensee claiming he had obtained a surrender of the sub-leases brought an action to have an accounting and a receiver of the mines appointed. The court of equity denied the plaintiff relief upon the well recognized ground or rule that where a person has embarked in an enterprise calling for heavy expenditures upon the faith of a supposed title and has been encouraged by another who stands by and sees the expense incurred, without setting up at the time, any conflicting claim, of his own; the party who has shown such disingenuous conduct may find that in equity he has either lost his legal

lord who has promised to compensate a tenant for his improvements can not escape his liability by declaring a forfeiture of the lease for non-payment of rent.<sup>38</sup> And on the other hand a covenant with the lessor that the tenant's improvements shall belong to the tenant at the end of his term does not justify him in holding over until he receives their value. The tenant's remedy is to vacate the premises and recover in an action on the covenant or he may, in some instances, sue on the covenant as a counterclaim in an action for the rent.<sup>39</sup>

**§ 750. Compensation to the lessee for his improvements in case of the sale of the premises.** An agreement by a lessor that in case of the sale of the property by him he will pay his lessee for the improvements made by the lessee refers to such a sale or disposition of the property as will terminate the rights of both the lessor and the lessee to the possession of the premises. A mere optional contract to sell made by the lessor which may go into operation after the term has expired but cannot do so before its expiration does not entitle the lessee to call on the lessor for the value of the improvements<sup>40</sup> for as soon as the term expires the tenant can remove his fixtures and if he does this promptly he will not suffer from a subsequent sale of the premises. The sale must be such a sale as will deprive the lessee of his right to possession or he will have no right to demand compensation. A mere conveyance of the reversion which expressly reserves the tenant's rights under the lease by the operation of which the grantee takes the fee simple subject to the lease and the lessee thereby becomes the tenant of the grantee does not give the lessee the bene-

right or has postponed it in point of enjoyment or enforcement to a future period by which justice may be done to the party whom he has misled.

<sup>38</sup> Knight v. Orchard, 92 Mo. App. 466.

<sup>39</sup> Speers v. Black, 34 Mo. 101. Where the lessee of the premises confessed judgment in ejectment and having had his interest valued surrenders his lease to the owner of the fee but subsequently and about seventeen years later succeeds in having the surrender

set aside as bad both in law and equity persons who became tenants after the surrender and expended large sums of money in improving the premises will be protected. The lessee who knowing the leasing to new tenants and their improvements acquiesces for fifteen years will be enjoined from ousting those who have acquired rights owing to his laches. Shine v. Gough, 1 Ball. & Beat. 436, 444.

<sup>40</sup> Stewart v. Pier, 58 Iowa 15, 18, 11 N. W. Rep. 711.

fit of the covenant,<sup>41</sup> under which he has a right to demand compensation for his loss of fixtures or improvements in case of a sale of the reversion. Nor does the condemnation of the premises for public purposes under the right of eminent domain constitute a sale of the same by the lessor within a provision that the lessor is to pay the lessee for improvements in case of a sale of the premises.<sup>42</sup> Where the lessor has covenanted to pay for the lessee's improvements on a sale of the premises which sale was to put an end to the term and it is also provided that if the parties to the lease cannot agree upon the value of the improvements an arbitration to fix their value shall be had the lessee, upon the refusal of the lessor to arbitrate, may at once maintain an action against the lessor for the value of the improvements as they existed at the date of the sale.<sup>43</sup>

**§ 751. The meaning of the word "improvements."** The word improvements includes everything which tends to add to the value or convenience of a building whether it be a store, factory, warehouse, dwelling or farm house. Whatever makes the building worth more to the tenant or increases the enjoyment, comfort or profit he derives from it during the term is an improvement. Improvements include repairs of all kinds and are very much more comprehensive than fixtures. Indeed it is difficult to think of anything added by a tenant to a building for his own advantage or comfort which would not be included un-

<sup>41</sup> Chandler v. Oldham, 55 Mo. App. 139, 144.

<sup>42</sup> McAllister v. Reel, 53 Mo. App. 81. See, Pintard v. Irwin, 20 N. J. Law 497 where a sale took place during the term and the compensation was ordered to be paid at once.

<sup>43</sup> Morton v. Weir, 70 N. Y. 247, 249 affirming 5 Hun, 177, under the terms of the lease the landlord could by a sale terminate the right of the tenant to possession. The tenant thereby at once acquired an absolute and present right to compensation and he was not bound to attorn to the grantee of his landlord and occupy the

premises under him. "The tenant had no right to occupy under the lease after the sale of the premises. He would not have been bound to attorn to the grantee and occupy under him had he been willing to regard the lease as still in force, and the tenancy as continuing, of which there is no evidence. Upon the sale the term ended by force of the agreement, and the right of the tenant to compensation became absolute, and upon the refusal of the landlord to submit the value to arbitration a present right of action arose, and the right to recover by action was perfect."

der the term.<sup>44</sup> In a provision in a lease declaring that "all improvements placed" in the premises "by the lessees, viz., elevators, boilers, heating apparatus, etc.," shall be deemed "fixtures not to be removed" the videlicet clause limits the meaning of

"Parker v. Wulstein, 48 N. J. Eq. 94, 96, 21 Atl. Rep. 623, holding shelves which besides being nailed to boards or cleats, which were nailed to the wall, rested on counters which were not fastened to the wall or floor, and furnaces and hot air pipes passing the holes in the floors and walls and large awnings on frames detachable from the hooks on which they were hung were improvements. The fact that all these articles were easily removable by the tenant with little if any damage to the house did not deprive them of their character of improvements. See, also, Agnew v. Whitney, 30 Leg. Int. (Pa.) 312; Metropolitan Concert Co. v. Sperry, 9 N. Y. St. Rep. 342. "The covenant is to surrender all the improvements that may have been placed thereon. Improvements clearly, as the word is here used, embrace every addition, alteration, erection or annexation made by the lessees during the demised term, to render the premises more available and profitable, or useful or convenient to them. It is a more comprehensive word than "fixtures," and necessarily includes it, and such additions as the law might not regard as fixtures. It would be difficult to select a more comprehensive word; and where the parties say that all improvements which may be placed on the premises shall belong to the lessors, it is difficult to say what, if anything, should be excluded. Such we think is

the view taken by the common pleas of England, in a case not dissimilar to the present. West v. Blakeway, 2 Man. & Gr. 727. In that case the tenant had covenanted to yield up at the expiration of his term all erections and improvements erected, made or set during the term; and it was held that this covenant was broken by the removal of the sashes, and frame work of a green house erected during the term, the frame work of which was laid upon walls built for the purpose of receiving it and embedded in mortar thereon. The judges thought the parties had intentionally adopted the words "erections and improvements," for the very purpose of avoiding all discussions as to what might be considered as coming within the description of a fixture. It is very apparent that the court, in that case, did not place their judgment on the assumption that the green-house was a fixture, but on the covenant to surrender all erections and improvements, and that those words were more comprehensive than fixtures." By the Court by Davies, J. in French v. Mayor etc. of New York, 29 Barb. (N. Y.) 363, 365, 16 How. Pr. (N. Y.) 220, in which case the court held all sorts of gas fixtures, lumber in a hat room, doors, hinges and locks, a stage floor, a large glass case, benches, upholstered wood work and canvass covering the stage, picket fence on a bridge, and various sheds,

the word "improvements" to the articles specified in the clause, and to things so connected with them as to form a part of them. The "etc.,," at the end of the clause does not enlarge its scope and signification further than to clearly indicate the intention of the parties to include articles connected directly with those specified.<sup>45</sup> So a provision in a lease of premises that all improvements made by a lessee were to remain includes a floor put in by the lessee the better to fit the same for the use of the premises as a skating rink and bicycle hall.<sup>46</sup> The word "improvement" when used in a lease by which the tenant is to make improvements up to a certain amount includes not only repairs and additions to old building but also the erection of new buildings.<sup>47</sup> There is a clear distinction between inside improvements and outside improvements. An agreement by either party to the lease to make inside improvements binds him to make all such improvements within the four walls of the house as are necessary. Thus, a furnace erected in the house for heating purposes is an interior or inside improvement.<sup>48</sup> Where a tenant is to make improvements with the right of removing them at the end of the term provided he pays all rent the person who purchases the improvements from him may remove them at the end of the term but he is under the same obligation to pay rent as the tenant.<sup>49</sup> The tenant who is entitled to compensation at the end of the term for improvements may claim compensation for a hall for dancing built by him upon a stone foundation in the ground. The subsequent renewal of the lease by the landlord is a consent to such improvements. The renewal does not deprive the lessee of his right for compensation for the improvements and where, after he has erected the improvement the land on

ticket office and other fences erected in the premises which was leased for theatrical purposes to be improvements.

<sup>45</sup> Loeser v. Liebmann, 60 Hun, 579, 14 N. Y. Supp. 569; affirmed in 137 N. Y. 163, 555, 33 N. E. Rep. 147, 150, holding that the lessees might remove a small engine, a pump, and a tank placed by them on the premises to operate an electrical apparatus in the same

building and to operate passenger elevators in an adjoining building not connected with the other articles specified.

<sup>46</sup> Harris v. Kelly, (Pa.) 13 Atl. Rep. 523.

<sup>47</sup> Peters v. Stone, 193 Mass. 179, 79 N. E. Rep. 336.

<sup>48</sup> Smith v. Hess, (Iowa) 48 N. E. Rep. 1030.

<sup>49</sup> Rooney v. Crary, 8 Ill. App. 330.

which it stands is taken for public uses, the tenant may, as against his landlord, recover the award made for the building taken.<sup>50</sup> The making of improvements by the lessee on or before a date specified may be made a condition of the tenant continuing in possession. Thus a covenant by the tenants that they would make a particular improvement on or before a particular date "and in case they (the tenants) fail to comply with any of the foregoing stipulations they agree to forfeit said lease" is a condition upon the breach of which there is a forfeiture.<sup>51</sup>

**§ 752. The lessor's covenant to pay for improvements runs with the land.** The covenant of the landlord to pay the lessee for his improvements or fixtures placed by the latter upon the land during the term is as a general rule regarded as a covenant which runs with the land. The lessee's assignee may therefore recover thereon as against the lessor.<sup>52</sup> In the absence of an express agreement between a lessee and his assignee to the contrary the latter is entitled to the use, free of charge, so far as the former is concerned, of all the lessee's fixtures in the premises when the assignee goes into possession under the assignment and which belong to the lessee. Nor can the lessor collect extra rent for the use of the fixtures from his assignee, for the only privity between the assignee and the lessor arises from privity of estate and this privity of estate extends only to the property

<sup>50</sup> Livingston v. Sultz, 19 Hun (N. Y.) 375. The lessee's agreement to make improvements covers not only repairs and additions to buildings on the premises but new buildings. And his agreement to leave the same at the end of the term binds his assignee. Hence where the assignee of the lessee erected certain buildings on the land and the lessee was ousted for non-payment of rent and the assignee voluntarily surrendered the premises the building belongs to the lessor who may in equity enjoin a purchaser of the building from the assignee of the lessee from removing the same from the premises.

Peters v. Stone, 193 Mass. 179, 185, 79 N. E. Rep. 336.

<sup>51</sup> Winn v. State, 55 Ark. 360, 18 S. W. Rep. 375.

<sup>52</sup> Hunt v. Danforth, 12 Fed. Cases, 6,887, 2 Curt. 592; Pelan v. De Bevard, 13 Iowa, 53; Estabrook v. Stevenson, 47 Neb. 206, 66 N. W. Rep. 286; Lametti v. Anderson, 6 Cow. (N. Y.) 302; Wray v. Rhinelander, 52 Barb. (N. Y.) 553, 567; Ecke v. Fetzer, 65 Wis. 62, 26 N. E. Rep. 266; Hazelwood v. Pennybacker, (Tex. Civ. App. 1899) 50 S. W. Rep. 199; contra Peterson v. Haight, 1 Miles (Pa.) 250; and compare Talbot v. Cruger, 151 N. Y. 117, 45 N. E. Rep. 364.

owned by the lessor *i. e.* the land and not the property on the land owned by the lessee who is the assignor.<sup>53</sup> Where the owner of land on which are buildings owned by another person leases the land to the other by a lease giving the lessee an option at the end of the term either to remove the buildings or to require the lessor to purchase them at an ascertained value and the lessee, with the consent of the lessor assigns all his right, title and interest in the lease, the assignment conveys the ownership of the buildings to the assignee and he may compel the lessor to buy them.<sup>54</sup> If the lessor knows that the lessee has assigned his term he cannot, with safety to himself, pay the value of the improvements made by the lessee to the assigned lessee. It is not even necessary that the assignment of the lease has been recorded to put the lessor on guard for if the lessor has actual knowledge of the assignment he is or ought to be on his guard. The only safe course for the lessor to pursue is to implead all the parties in a court of equity who claim the improvements, or if he pays the value of the improvements to any one of the claimants he should secure releases from all of them.<sup>55</sup> Whether a covenant by the lessor to pay for the lessee's improvements at the end of the term runs with the land and binds the assignee or grantee of the lessor in the absence of a provision making the lease binding on assigns, has been differently decided. The use of the word "assigns" in the covenant of the lessor will remove all necessity for a construction. Where this word is omitted many of the cases hold that the lessor's covenant to pay for the improvements made by the lessee does not bind the lessor's assignee or grantee<sup>56</sup> as it does not run with the land. For if a covenant be to do something as regards a thing not *in esse* at its date but to be erected or placed *de novo* on the premises it will not bind the assigns of the covenantor unless they are expressly named

<sup>53</sup> Weltman v. August, 11 Tex. Civ. App. 604, 33 S. W. Rep. 158.

<sup>54</sup> California Conference M. E. Church v. Seitz, 74 Cal. 287, 289, 15 Pac. Rep. 839 holding that the right to purchase improvements is not a contract distinct from the lease but a part of it. See, also, Hunt v. Danforth, 12 Fed. Cases No. 6, 887.

<sup>55</sup> Estabrook v. Stevenson, 47 Neb. 206, 212, 66 N. W. Rep. 286.

<sup>56</sup> Hansen v. Meyer, 81 Ill. 321, 25 Am. Rep. 282; Tallman v. Coffin, 4 N. Y. 134, Coffin v. Talman, 8 N. Y. 465; Masury v. Southworth, 9 Ohio St. 341; Grey v. Cuthbertson, 2 Chit. 482; Garton v. Gregory, 3 B. & S. 90.

in the covenant.<sup>57</sup> And as a covenant in order to run with the land must concern the land itself, it can hardly be said that an agreement to pay the tenant for his future improvements which is after all merely an agreement by the lessor to purchase personal chattels in the future from the lessee can run with the land.<sup>58</sup> Upon the other hand it has been held, after a careful consideration of the cases, that the lessor's covenant not containing the word "assigns" to pay for the tenant's improvements which are to be on the land at the expiration of the lease binds not only the lessor but his assignee also who takes an assignment during the term and receives rent from the lessee.<sup>59</sup>

**§ 753. Conditions precedent to the right of the tenant to remove structures erected by him.** A tenant who seeks to enforce a covenant in the lease which permits him to remove his fixtures and improvements must show that he has properly performed all the agreements on his part which are conditions precedent to and upon which his right and its exercise depend. If the tenant is bound to pay the rent and comply with all the covenants of the lease before he can sever his property he must prove affirmatively that he has done so.<sup>60</sup> His mere offer to do this if the lessor will permit him to remove his property from the demised premises is not sufficient.<sup>61</sup> So where by the terms of the lease the payment of rent by the tenant so fast as it becomes due is of the essence of the lease a tenant who is in default in the payment of the rent cannot claim to be compensated for his im-

<sup>57</sup> Tallman v. Coffin, 4 N. Y. 134, 136; Thompson v. Roe, 8 Cow. (N. Y.) 266, 269; Shep. Touch. 179; Bally v. Wells, Wilmot, 344, 345.

<sup>58</sup> Bream v. Dickerson, 2 Humph. (Tenn.) 126, 128.

<sup>59</sup> Ecke v. Fetzer, 65 Wis. 55, 61 26 N. W. Rep. 260. See, also, Mansel v. Norton, L. R. 22 Ch. Div. 769, where it was held that a devisee for life of land leased for a term could not recover from the executor of the testator the value of improvements which he had paid the lessee under a provision of the lease that the testator, his

heirs, executors and assigns should pay for improvements.

<sup>60</sup> Van Vleck v. White, 72 N. Y. Supp. 1026, 66 App. Div. 14.

<sup>61</sup> Clemens v. Murphy, 40 Mo. 121, 129; Mathinet v. Giddings, 10 Ohio 364. The attaching creditor of a tenant who has forfeited his right to remove his fixtures by his failure to pay his rent has no claim on the fixtures as against the landlord where the lease gave the tenant no right to remove fixtures after the expiration of the term. Morey v. Hoyt, 62 Conn. 542, 26 Atl. Rep. 127. See, also, Whibley v. Dewey, 8 Cal. 36.

provements on the premises.<sup>62</sup> This general rule however by which the tenant may lose or endanger his right to remove his fixtures by permitting his rent to be in arrears must be received with some qualifications. A forfeiture will always be relieved against in equity where it is incurred by accident or through the tenant's failure to pay a sum of money the interest upon which calculated from the date upon which it was payable will compensate the landlord for any loss he may have sustained. And, inasmuch as the forfeiture will be avoided even where it would result in the destruction of the term, with greater reason should the tenant have relief when a forfeiture growing out of his default in the payment of rents, perhaps for a few days or other short period means the loss of valuable personal property to the tenant. Hence if the failure to pay rent was due not solely to the deliberate intention of the tenant but to accident or to his temporary financial inability to do so on his part he will be permitted to remove his property on his paying his arrears of rent with interest and any other damages which his landlord may have had.<sup>63</sup> So where by the express terms of a lease the landlord has stipulated that certain fixtures, used by his tenant in operating a mine, should continue the personal property of the lessee the latter does not lose his ownership thereof by his failure to pay rent though upon such failure the lease itself is forfeited.<sup>64</sup> So, also, where it was stipulated in a lease that certain personal property in the nature of fixtures might be removed at its termination "unless all right had been forfeited by a forfeiture of this lease," the lessee does not lose his right to remove the fixtures in a reasonable time after the term has expired by a forfeiture of the lease for the non-payment of the rent. The parties at the date of forfeiture are possessed of the same rights as though the lease had expired at the time fixed upon and determined.<sup>65</sup>

**§ 754. The taking of a new lease by the tenant.** The right of a tenant to remove his fixtures may undoubtedly be waived by him. His waiver may be implied from his conduct as for example from his leaving the premises when the term ex-

<sup>62</sup> Smith v. Caldwell, 78 Ark. 333, 95 S. W. Rep. 467. 42 Atl. Rep. 17, 18, 29 Pittsb. Leg. J. (N. S.) 320, 43 W. N. C. 323.

<sup>63</sup> Estabrook v. Hughes, 8 Neb. 496, 501, 1 N. W. Rep. 132. <sup>64</sup> Mickle v. Douglas, 75 Iowa 73, 39 N. W. Rep. 198.

<sup>65</sup> Wick v. Bredin, 189 Pa. St. 83,

pires without having removed the fixtures. So, too, a waiver of his right to remove fixtures has been implied from the tenant's acceptance of a new lease of the premises, including the buildings which he has erected during the prior term, without any reservation of a right in or to fixtures, or mention of his claim to such buildings and from his occupation under the new lease. His conduct in taking a new lease and in continuing his former occupation thereunder is equivalent to his abandonment of the premises with the fixtures. He is now in possession under a new tenancy and any rights which he might have possessed or exercised under his earlier tenancy he is presumed to have abandoned to the same extent as though he had actually removed from the premises and after an interval had re-hired them. By taking a new lease of the land with the buildings he leases the land as it then exists and he is furthermore estopped to deny his landlord's title to the buildings to the same extent as he is estopped to deny his title to the land.<sup>66</sup> To permit the tenant to say that a portion of the premises which he receives and occupies is a fixture would be in its effect to permit him to deny his landlord's title to a part of the premises and inferentially to the whole of the demised premises. He is now in possession under his new lease as of a new estate under which his rights are to be measured

<sup>66</sup> *Hedderick v. Smith*, 103 Ind. 203, 205; *Longhran v. Ross*, 45 N. Y. 792, 795, 6 Am. Rep. 173; *Marks v. Ryan*, 4 Ky. Law Rep. 842, 63 Cal. 107; *Watriss v. First National Bank*, 124 Mass. 571, 26 Am. Rep. 694; *Jungerman v. Boeve*, 19 Cal. 354; *Wadman v. Burke*, (Cal. 1906) 81 Pac. Rep. 1012, 1 L. R. A. (N. S.) 1192; *Cook v. Sanitary Dist. of Chicago*, 67 Ill. App. 286, affirmed; *Sanitary Dist. of Chicago v. Cook*, 48 N. E. 461, 169 Ill. 184; *George Bauernschmidt Brewing Co. v. McColgan*, 89 Md. 135, 42 Atl. Rep. 907; *Hays v. Schultz*, 68 N. Y. Supp. 340; *Van Vleck v. White*, 72 N. Y. Supp. 1026, 66 App. Div. 14; *Carlin v. Ritter*, 68 Md. 478, 13 Atl. Rep. 370; *Spencer v. Com-*

*mercial Co.*, 39 Wash. 22, 71 Pac. Rep. 53. But compare *Lewis v. Ocean Nav. & Pier Co.*, 125 N. Y. 341, 26 N. E. Rep. 301, affirming 3 N. Y. Supp. 911; *Cruger*, 151 N. Y. 117, 45 N. E. Rep. 364; *Stephens v. Ely*, 162 N. Y. 79, 56 N. E. Rep. 499, 500, reversing 43 N. Y. S. 762, 14 App. Div. 202; *Nieland v. Mahnken*, 85 N. Y. S. 809, 89 App. Div. 463; *Williams v. Lane*, 62 Mo. App. 66; *City of St. Louis v. Nelson*, 83 S. W. Rep. 271, 108 Mo. App. 210; *Fitzherbert v. Shaw*, 1 H. Black 258; *Heap v. Barton*, 12 Com. Bench 274; *Thresher v. Proprietors of the East London Waterworks*, 2 B. & C. 608; *Weeton v. Woodcock*, 7 M. & W. 14.

according to the condition of things as they existed when he entered.<sup>66a</sup> This doctrine has not however received the unanimous support of all the cases. It has been sometimes criticised by the courts as based upon technical reasons rather than upon natural considerations and the courts of some of the states of the Union have pointed out that it is simply begging the question to assume that the second lease included a demise of the buildings because it failed to mention them expressly.<sup>67</sup> So a tenant who accepts a renewal of a lease after placing fixtures upon the premises which he has a right to remove without inserting a clause conferring on him any reservation of the right to remove such fixtures at the end of the new term is not presumed to have abandoned his rights to remove fixtures under the earlier lease, where, during the pendency of the later lease, he is summarily ejected from the premises<sup>68</sup> by the landlord.<sup>69</sup> The right of the tenant

<sup>66a</sup> A distinction which is noticed by some but not by all the cases is between an extension of the old lease and the making of a new one. Obviously a mere extension of a lease nothing being said as to terms and conditions would be upon the same terms and conditions as the lease extended in the absence of an express agreement to the contrary. A new lease is on a different basis. It does not seem at all material that the new lease is given in the performance of a covenant in the old lease for a renewal or that the possession and occupation of the tenant are unbroken. The renewal lease must contain an agreement expressly authorizing the tenant to remove his fixtures. The rule unquestionably works a hardship to the tenant in most cases and one which unquestionably was not in the intention of the parties to the lease. It is most often invoked in a case where the original lessor has parted with his fee and a grantee has renewed the lease. The circumstance that

the renewal was at a lower rent than that payable under the old lease or than that at which it had been agreed the tenant was to have a renewal may strengthen the presumption. *Wadman v. Burke*, (Cal. 1905) 81 Pac. Rep. 1012; 1 L. R. A. (N. S.) 1192.

<sup>67</sup> *Kerr v. Kingsbury*, 39 Mich. 150, 155, 33 Am. Rep. 362; *Davis v. Moss*, 38 Pa. St. 346, 353; *Second National Bank v. I. E. Merrill Co.* 69 Wis. 501, 34 N. W. Rep. 314. See, also, *Clarke v. Howland*, 85 N. Y. 204, which apparently though not expressly overrules *Loughran & Ross*, 45 N. Y. 792.

<sup>68</sup> *Bergh v. Herring-Hall-Martin Safe Co.* 136 Fed. Rep. 368.

<sup>69</sup> A renewal of a lease "with all its conditions unchanged and unimpaired" does not confer a right on the lessee to enforce a contract in the original lease by which the lessor had agreed to pay him for a house he was to erect on the premises, *Kash v. Huncheon*, 1 Ind. App. 361, 27 N. E. Rep. 645. A new lease

to remove fixtures under an old lease is never lost unless the minds of the parties to the new letting actually meet upon the terms of the new lease and the tenant actually continues in possession under the new lease. The tenant's mere holding over upon the premises with the landlord's consent and even his paying rent while the negotiations for a new lease are pending, do not deprive him of his right under the lease which has expired to remove his fixtures provided he shall do so within a reasonable time before the new lease is executed. Nor can the landlord by promising the tenant to execute a lease from time to time deprive the latter of his title to the fixtures where the landlord ultimately neglects or refuses to keep his promises.<sup>70</sup> A tenant who upon the expiration of his term makes a temporary lease until a new lease for a longer period can be prepared does not thereby waive his right to remove his trade fixtures.<sup>71</sup> This is also the rule where the tenant remains in possession of the premises after the termination of a renewal period, without any objection from his landlord though without the tenant having served notice of an intention to renew. The tenant may remove his fixtures while holding over as the relation of landlord and tenant continues until the service of a notice required by statute.<sup>72</sup> A covenant in a lease giving the lessee an option to purchase the demised premises at a price specified in the covenant does not constitute a waiver by the tenant of his common law right to remove trade fixtures at the end of term in case he does not purchase.<sup>73</sup>

which provides that the lessee shall leave the premises in as good condition as they were then in, does not deprive him of his right under a prior lease to remove fixtures, where the occupation is continuous. McCarthy v. Truemacher, 108 Iowa, 284, 78 N. W. Rep. 1104.

<sup>70</sup> Lynn v. Waldron, 36 Wash. 82, 80 Pac. Rep. 292, where a tenant after his term expired held over as a tenant from month to month with a right to remove fixtures. The lessor wrote the lessee that he agreed to permit him to remain for a specified pe-

riod at a monthly rental, but stating no new terms and saying nothing about the removal of his fixtures. As against the lessor's grantee by a conveyance expressly reserving buildings, it was held that there had been no renewal which would deprive the lessee of any of his rights.

<sup>71</sup> Wright v. Macdonell, 88 Tex. 140, 27 S. W. Rep. 104, 30 S. W. 907.

<sup>72</sup> Lewis v. Perry, 149 Mo. 257, 50 S. W. Rep. 821.

<sup>73</sup> Electric Light & Power Co., 55 Fed. Rep. 229. A covenant by the lessor to renew, or in the alter-

**§ 755. Covenants which give the landlord a lien for his rent on buildings of a tenant.** It is valid to insert a provision in a lease to the effect that the building and improvements which have been erected on the premises by the tenant during

native to purchase the buildings erected by and belonging to the lessee, does not operate, by implication as a conveyance of the tenant's buildings to the lessor where the lease is renewed upon its termination. The buildings continue the property of the lessee under the new lease as the renewed lease is presumed to contain the same covenants as the lease which it supersedes. Howe's Cave Ass'n v. Houck, 21 N. Y. Supp. 40, 66 Hun, 205, affirmed in 141 N. Y. 606, 36 N. E. Rep. 740, 58 N. Y. St. Rep. 740, *contra*, King v. Wilson 98 Va. 259, 35 S. E. Rep. 727. Some courts have seized upon the particular circumstances of the case to take it out of the general rule which is stated in the text. So where a license was given to continue to operate a mine the lease of which had expired pending negotiations for a longer lease, the licensee stipulating to pay the same royalties as were payable under the lease which had expired, the court concluded that it would be unreasonable to assume that the licensee in renewing the lease for such a short time (60 days) had in consideration thereof abandoned all the improvements he had placed on the premises under the expired lease and which were worth five thousand dollars. Wright v. Macdonnell, 88 Tex. 140, 151, 27 S. W. Rep. 104, 30 S. W. Rep. 907. "It is a lease for a term of years, to take effect upon the expiration of the prior

yearly tenancy, containing terms, conditions, stipulations which did not pertain to the prior tenancy by the year, and which contained no reservation of the right to remove the fixtures found on the premises; and it was under this lease that the tenant continued in possession. The question then immediately before us is, what effect had the acceptance of this lease and continuing in possession under it, upon the tenant's right to remove these trade fixtures? And here again in answer to this question, all the elementary writers concur in laying down the proposition that if a tenant having the right to remove fixtures erected by him on the demised premises, accepts a new lease of such premises without reservation or mention of any claim of such fixtures, and enters upon a new term thereunder, the right of removal is lost, notwithstanding his actual possession has been continuous. The reason given is, because the fixtures set upon the premises at the time of the lease, are part of the thing demised, and the tenant by accepting a lease of the land without reserving his right to the fixtures, has acknowledged the right of his landlord to them, which he is afterward estopped from denying." By the court, Miller, J. in Carlin v. Ritter, 68 Neb. 478. See also the very full discussion in Watries v. Nat. Bank, 124 Mass. 571, 26 Am. Rep. 694.

the term shall become a part of the real property and shall not be removed by the tenant except with the written consent of the landlord who has a right to withhold such consent until the rent is fully paid and all the covenants performed. It has been held that a stipulation of this character does not vest in the landlord a title to the structure merely because the tenant does not pay the rent. The tenant has the legal ownership which he may lose in case he fails to comply with the lease and the landlord has a lien in the nature of a chattel mortgage on the buildings to secure the payment of the rent by the tenant. The tenant has a right to redeem from this lien. He can redeem from the lien only by paying the rent and by performing all of the covenants binding on him by the lease. It is only then that he can remove a building from the land. He cannot sell the buildings or have them sold for his own benefit and the proceeds applied to the payment of the rent. He must at least have a reasonable time within which to pay the rent. And equity will protect his rights under such circumstances and refuse a decree of forfeiture unless the tenant is willfully in default.<sup>74</sup>

**§ 756. The lessee's lien for the value of his improvements.** A stipulation in the lease by the parties to it that the lessor shall pay the lessee for his improvements and that the latter shall have a lien for the value of the improvements placed upon the demised premises is valid and may be enforced in equity as a lien. An assignee of the lessee may enforce such an express contract lien.<sup>75</sup> Whether a tenant shall have an implied lien upon his improvements placed upon the demised premises for their value, in the absence of an express agreement to that effect contained in the lease has been variously decided. It is useless to endeavor to harmonize the cases. On the one hand it has been held by several authorities that the language of the lease must be express in order that such a lien in favor of the lessee may exist. It will not arise by implication or by necessity nor will it be recognized as a presumption of law from an agreement in the lease by the lessor to pay the lessee for his expenditures in making improvements.<sup>76</sup> In one or two instances a dif-

<sup>74</sup> Rooney v. Crary, 8 Ill. App. 455; Whitlock v. Duffield, 2 Edu. 329, 334. Ch. (N. Y.) 366; New York Dye-

<sup>75</sup> Anderson v. Ammonett, 9 ing & Printing Establishment v. Lea, (Tenn.) 1. De Westenberg, 46 Hun (N. Y.)

<sup>76</sup> Mitchell v. Printup, 48 Ga. 281; Bream v. Dickerson, 2

ferent rule has been laid down by the cases and an implied lien in favor of the tenant for the value of his improvements has been recognized. Clearly in some cases the common law remedy of the tenant may prove inadequate for his relief. In such circumstances he has received equitable relief. Thus a lessee who has erected permanent and valuable buildings and improvements upon the demised land under an agreement by the lessor that he will pay for the same at their appraised value may have relief in equity as well as in a common law action on the covenant where, under the circumstances, the common law remedy is inadequate. The court will order that the lessee shall have an equitable lien<sup>77</sup> on the premises for the value of his improvements and it may also direct that their actual value shall be ascertained under the order and direction of the court and that the premises may be sold and the lessee paid the value of his improvements out of the proceeds of the sale. The Chancellor may, in the meantime, restrain by an injunction the lessor from appropriating the tenant's improvements and from interfering with them to the damage of the lessee.<sup>78</sup> If it is evident before the lease has expired that the lessor will not perform his contract to re-imburse the lessee a court of equity will, upon the application of the lessee, order the specific performance of a contract to re-imburse the lessee for his improvements. And if after a lease has expired, the lessee brings a bill for compensation and damages equity will entertain it though under such circumstances an action at law for damages may furnish full reparation to the lessee.<sup>79</sup> Where the lessee and the lessor have entered into a valid and mutually obligatory stipulation by which the former agrees to place buildings or other improvements upon the premises which the latter agrees to pay for at a valuation, and the parties have neglected to indicate by whom the chattels are to be appraised, a court of equity will take the matter in hand and appoint some competent person by whom the appraisal shall be made.<sup>80</sup>

Humph. (Tenn.) 126; Hite v. Parks, 2 Tenn. Ch. 373; *In re Conrad's Lots*, 20 Wall. (U. S.) 115, 22 Law Ed. 328.

<sup>77</sup>Boorman v. Wisconsin R. E. Co., 36 Wis. 207.

<sup>78</sup>Conover v. Smith, 17 N. J.

Eq. 51, 55, 86 Am. Dec. 247; Berry v. Van Winkle, 2 N. J. Eq. 269, 277; Swift v. Sheehy, 88 Fed. Rep. 924.

<sup>79</sup>Berry v. Van Winckle, 2 N. J. Eq. 269, 276.

<sup>80</sup>City of Providence v. St.

**§ 757. Improvements by the landlord prior to the entry of the tenant.** Where an owner leases his real estate which is to be occupied by a tenant at a future date, and before the tenant goes into the possession and without a request from him the owner makes certain improvements in the premises which are necessary to prepare the premises for the tenant's occupancy, the tenant is under no legal liability to pay for such improvements, unless the obligation to do so is expressly created by contract.<sup>81</sup> Even the fact that the improvements were made at the tenant's express request does not make the tenant liable for their value unless he also promised to pay for them or to pay an increased rent on account of them. If it is agreed between the parties to a lease that the lessor shall place or erect buildings or improvements prior to the entry of the lessee on the premises the lessor is absolved from any liability he may be under for his failure to do so by notice from the lessee given prior to the date for his entry that he would not enter under the lease.<sup>82</sup> Nor is the landlord under such circumstances bound to tender performance<sup>83</sup> to the tenant of his covenant to erect buildings or make improvements. The landlord cannot, after he has accepted a surrender of the premises from his tenant, recover from the tenant the value of improvements which the landlord placed on the property during the term but which were to be paid for by a part of the rents reserved.<sup>84</sup>

**§ 758. The rights of an assignee or mortgagee of the tenant.** An assignee of the term claiming under an assignment from the tenant has the same right to remove fixtures at the end of the term, as his assignor but no more.<sup>85</sup> So, too, the tenant may convey a good title to the fixtures during the term, distinct from his assignment of any interest he may have in the term itself, and his conveyance of the fixtures whether by their sale or mortgage, will carry all his right, title and interest therein as against his landlord.<sup>86</sup> But the mortgagee of fixtures

John's Lodge, 2 R. I. 46, 58; Morse v. Merest, 6 Madd. 25; Wilkes v. Davis, 3 Mer. 509; Milnes v. Gerry, 14 Ves. 407.

<sup>81</sup> First Nat. Bank v. Lucas, 21 Neb. 280, 283, 31 N. W. Rep. 805.

<sup>82</sup> Floyd v. Maddox, 68 Ind. 124.

<sup>83</sup> Kirland v. Wolf, 7 Ohio, Dec. 436, 3 Weekly Law Bul. 114; and

compare Elsas v. Meyer, 10 Ohio, Dec. 518, 21 Weekly Law Bul. 346.

<sup>84</sup> Welcome v. Hess, 90 Cal. 507, 514, 27 Pac. Rep. 369, 25 Am. St. Rep. 145.

<sup>85</sup> Moore v. Smith, 24 Ill. 512.

<sup>86</sup> Gordon v. Miller, (Ind. App.) 63 N. E. Rep. 774

owned by a tenant has no greater right so far as their removal is concerned than his mortgagor.<sup>87</sup> He may foreclose and remove the fixtures on the tenant's default on his mortgage and a tenant, who during his term has given a chattel mortgage on his fixtures, cannot defeat the right of his mortgagee to enter during the term and remove the mortgaged property, by surrendering the lease to his landlord before it has expired.<sup>88</sup> If the right of the tenant to enter the premises and remove fixtures is lost, the mortgagee's rights are also gone to the same extent.<sup>89</sup> Where by reason of the failure of a tenant to pay the rent the lease is broken, and the landlord has acquired a right of re-entering upon the premises for the forfeiture which right he has exercised the assignee of the lessee enjoys no right by the assignment to remove a building which the tenant had erected during his occupancy of the premises. This being the case the assignee of the lessee cannot by an injunction prevent the removal of the building by the lessor after the assignment nor can he after forfeiture acquire any right to remove the building by paying the arrears of rent which may have accrued down to the time he desires to remove it.<sup>90</sup> The rights of an assignee or mortgagee of the tenant's fixtures having vested cannot be destroyed by conclusion between the landlord and tenant in surrendering or cancelling the lease. After a building or other chattel which was erected on the premises by a lessee who is to retain it as his personal property by a covenant in the lease, becomes by sale the property of a stranger who is acting in good faith and parts with value the cancellation of the lease by the parties to it, or by their assigns does not affect his rights; but he may remove the building at the end of the term for which the lease was originally given.<sup>91</sup> Perhaps he need not wait until the end of the term if by waiting his interests are prejudiced. As the fixture is his

<sup>87</sup> Fuller v. Brownell, 48 Neb. 145, 67 S. W. Rep. See also, Hewitt v. General Electric Co., 164 Ill. 420, 45 N. E. Rep. 725, affirming 61 Ill. App. 168 (Chattel mortgage on mining machinery); Upton v. Hosmer, 70 N. H. 493, 49 Atl. Rep. 96.

<sup>88</sup> Loan & Discount Co. v. Drake, 6 C. B. 796.

<sup>89</sup> Bush v. Havird, 12 Idaho, 352.

86 Pac. Rep. 529. As to the conflicting rights of a chattel mortgagee of a lessee's fixtures, and the landlord, Sampson v. Camperdown Cotton Mills, 64 Fed. Rep. 939.

<sup>90</sup> Little Falls Water Company v. Hausdorf, 127 Fed. Rep. 442.

<sup>91</sup> Adams v. Goddard, 48 Me. 212, 216.

property he may remove it at once. As soon as the lessee surrenders his term a mortgagee or purchaser in good faith from the lessee of a personal chattel in the nature of a removable fixture may remove the same if he shall do so in a reasonable time after he has notice of the surrender. This rule also operates in favor of a mortgagee or vendee of a fixture on the forfeiture of the lease by the voluntary act of the lessee.<sup>92</sup>

**§ 759. The tenant's sale of his fixtures when within statute of frauds.** The personal property of a tenant, though it be removable, is a part of the freehold during his term and the sale by him of these chattels while they are attached thus to the premises is not a sale of goods and chattels under the Statutes of Frauds. All the tenant has a right to do is to sell them in their character as fixtures which he has a right to remove during the term and which right he may lose if he does not remove them. Under a sale made by the tenant during a term this is all that the vendee takes and he may lose his right to remove the fixtures if he delays too long.<sup>93</sup> It is only after fixtures are severed from the premises that they actually are goods and chattels and a contract for their sale after they are removed would be within the statute.

**§ 760. The rights of an assignee and mortgagee of the landlord.** Personal chattels which have been annexed or attached to the premises by the tenant under such circumstances that between him and the landlord they belong to the latter pass by a conveyance of the premises by the landlord and are subject to the lien of a mortgage given by the landlord.<sup>94</sup> The rule as

<sup>92</sup> *In re Glasdir Copper Mines*, 73 Ch. J. C. (1904) 1 Ch. 819, 90 Law T. 412, 11 Manson, 224. Movable fixtures are considered the personal property of the tenant, and when not exempt they may be taken from the house and sold on process against him as goods and chattels. Accordingly a mortgage by a tenant of a stock of goods "and all fixtures and utensils in said store belonging to the mortgagor covered an iron safe, the show case, platform scales and trucks, copying press,

chandeliers and cheese case, which were in use in the store at the execution of the mortgage. *McCall v. Walter*, 71 Ga. 287, 290, 292.

<sup>93</sup> *Hallem v. Runder*, 1 C. M. & R. 266; *Lee v. Gaskell*, 34 L. T. 759, 1 Q. B. D. 700; *Thomas v. Jennings*, 66 L. J. Q. B. 5, 75, L. T. 274, 45 W. R. 93.

<sup>94</sup> *First Nat. Bank v. Adam*, 138 Ill, 483, 28 N. E. Rep. 995, St. Louis & S. F. Ry. Co. v. Beadle, 6 Kan. App. 922, 50 Pac. Rep. 988.

between a landlord and his mortgagee is that as soon as a chattel becomes real estate its character as a fixture results to the benefit of the mortgagee in increasing his security and it does not seem material whether the chattel was affixed directly by the mortgagor himself, or by a tenant of the mortgagor so far as this rule is concerned, and these fixtures cannot be removed by the mortgagor or any person claiming under the mortgagor while the mortgage is in force without the consent of the mortgagee.<sup>95</sup> Thus where pending a foreclosure action a lessee of mortgaged premises places machinery and buildings of a permanent character on the premises, they become the property of the mortgagor and the tenant cannot remove them as against the purchaser at the foreclosure.<sup>96</sup> A distinction has been made, however, in a case where the removal of the chattel by a tenant would not damage the building so as to impair the security of the mortgage. It has been said, under such circumstances, that as regards the mortgagee they retain their character of personal property and are subject to levy and sale under an execution against the tenant. Unquestionably a mortgagor in possession before a foreclosure has been begun may agree with his tenant that the chattels which are by the tenant annexed to the freehold shall continue to be the personal property of the tenant and that the latter may remove that at any time.<sup>97</sup> If this contract between the mortgagor and his tenant is brought to the notice of the mortgagee and he assents thereto he is bound by it. The purchaser of the land or a mortgagee who takes title subsequent to an agreement between the mortgagor and his tenant, that the tenant shall retain the ownership of fixtures has the duty of ascertaining the tenant's rights. He must ascertain at his peril what rights the tenant in possession has under the lease. He is bound to do this as soon as he learns that there is a tenant in possession and if he fails to do so he is nevertheless chargeable with full notice of any rights a tenant may have regarding ownership of fixtures.<sup>98</sup> The courts have gone very far in protecting the tenant,

<sup>95</sup> Eckstrom v. Hall, 90 Me. 186; 38 Atl. Rep. 186, 66 N. Y. Supp. 791, 100 N. Y. St. Rep.; Berliner v. Piqua Club Association, 32 Misc. Rep. 470.

<sup>96</sup> William v. Chicago Exhibition Company, 188 Ill. 19, 58 N. E.

Rep. 611, reversing 86 Ill. App. 167.

<sup>97</sup> Pioneer Savings & Loan Co. v. Fuller, 57 Minn. 60, 58 N. W. Rep. 831.

<sup>98</sup> Friedlander v. Rider, 30 Neb. 783, 47 N. W. Rep. 83; Davis v.

who with the consent of the landlord, has placed trade fixtures upon the demised premises under an agreement that the tenant shall retain the property in them against the mortgagee, whether prior or subsequent thereto and particularly against the purchaser at foreclosure sale. Indeed, it is said generally that as between tenant and the purchaser under sale on foreclosure the former may remove his fixtures.<sup>22</sup> So, where a tenant of mortgaged premises under a lease subsequent in date to the mortgage, owns a green house and a heating apparatus which were on the premises and which, in their nature, were temporary buildings, it was held that he might remove these as trade fixtures as against a purchaser of the premises at foreclosure.<sup>1</sup> And it was said moreover in this case that the fact of the structure being a trade fixture was enough to put the purchaser at foreclosure on his guard; and that, as against him, it was not necessary for the tenant to show that the purchaser had notice of the contract of lease between the mortgagor and the tenant.<sup>2</sup> And if the mortgagee though he is prior to the lease, knew of the lease and knew that the tenant was placing personal property on the premises, as, for example, a saw mill under an agreement with the mortgagor that the saw mill was to remain the property of the tenant, the mortgagee is absolutely bound by his knowledge and he cannot prevent the removal of the saw mill by the tenant.<sup>3</sup> A tenant who has a right to remove his fixtures as against a purchaser at foreclosure may recover damages from the latter for his refusal to permit their removal.<sup>4</sup> The fact that the mortgagee did not sign the lease or consent to the improvements being made by the tenant does not prevent a tenant of mortgaged premises from removing trade fixtures. The mortgagee under his mortgage takes only such rights as the mortgagor had to convey and the mortgagee takes his conveyance subject to the rule of the removability of trade fixtures. Coupled with this is the duty which the mortgagee is under to

Buffum, 51 Me. 160; Hertzberg v. Witte, 22 Tex. Civ. App. 320, 54 S. W. Rep. 921.

<sup>22</sup> German Savings & Loan Soc. v. Weber, 16 Wash. St. 95, 47 Pac. Rep. 224.

<sup>1</sup> Royce v. Latshaw, 62 Pac. Rep. 627, 15 Colo. App. 420.

<sup>2</sup> Royce v. Latshaw, 15 Colo. App. 420, 62 Pac. Rep. 627, Kelly v. Austin, 46 Ill. 156.

<sup>3</sup> Paine v. McDowell, 71 Vt. 28, 41 Atl. Rep. 1042.

<sup>4</sup> Sprague Nat. Bank v. Erie R. Co., 22 App. Div. 526, 48 N. Y. S. 65, 82 N. Y. St. Rep. 65.

ascertain the tenant's rights.<sup>5</sup> The vendee of the premises on which fixtures have been placed also takes subject to the tenant's rights. A tenant who has erected buildings with the consent of his own lessor and with the right in him to remove them may remove them as against the vendee, even after the expiration of a subsequent lease from the purchaser of the premises though the original lease said nothing as to his right to remove fixtures.<sup>6</sup>

**§ 761. The liability of a landlord for personal property of his tenant left on the premises at the expiration of the lease.** A landlord who upon peaceably entering upon the demised premises upon the legal termination of the term of the lease finds personal property there which is not attached to the realty, may remove the same to some convenient place. In doing this he must use due care according to the circumstances and the size, value, condition and character of the chattels.<sup>7</sup> If in removing the goods in the premises either he or his assistants acting according to his direction are guilty of negligent or willful conduct by reason of which the chattels of the tenant are damaged, the landlord will be liable to the tenant in damages for his failure to use reasonable care. The landlord is not necessarily bound to house or to store the personal property or to protect it in any particular manner, if he uses ordinary care and leaves it in such a place that the owner can secure it in an uninjured condition. The degree, character and amount of care he must employ in removing the chattels depend wholly upon their nature and upon all the circumstances of each particular case.<sup>8</sup> A land-

<sup>5</sup> Belvin v. Ralph Paper Co., 123 N. C. 138, 31 S. E. Rep. 655, 657.

<sup>6</sup> Hurtzberg v. Witte, 22 Tex. Civ. App. 320, 64 S. W. Rep. 921.

<sup>7</sup> Stearns v. Sampson, 59 Me. 568, 574, 8 Am. Rep. 442; Rollins v. Movers, 25 Me. 192; Mugford v. Richardson, 6 Allen (Mass.) 76; Harris v. Gillingham, 6 N. H. 11; Curtis v. Galvin, 1 Allen (Mass.) 215; United States Mfg. Co. v. Stevens, 52 Mich. 330, 17 N. W. Rep. 934. After the lease is terminated the goods of the tenant then remaining on the premises were *damage feasant*, and the owner has a clear and

perfect right to go into the house with suitable assistants, and then, peaceably and quietly, without breach of the peace, to remove the goods to a near and convenient distance, and there leave them for the use of the owner, doing them no unnecessary damage." By the court in Whitney v. Sweet, 22 N. H. 10.

<sup>8</sup> United States Mfg. Co. v. Stevens, 52 Mich. 330, 17 N. W. Rep. 934. This case is always a question for the jury to determine on all the facts. Wetzel v. Meranger, 85 Ill. App. 457.

lord who on the expiration of the term consents that the outgoing tenant may leave his chattels on the premises with an understanding that they shall be kept for him until called for is liable only for gross negligence in guarding them which may result in their destruction or loss, though no storage was to be paid by the tenant. But if he uses ordinary care he is exempted as the bailment is gratuitous.<sup>9</sup> In the absence of a statute creating a lien for rent the landlord has no lien for rent accrued or for advances on the chattels of the tenant left in his possession with or without his consent upon the termination of the lease. The rule applicable to involuntary deposits such as lost articles and deposits of things by the winds or floods is applicable in such circumstances.<sup>10</sup> Though the landlord has no lien he is entitled by implication to a reasonable compensation for the care and expense of keeping, guarding and preserving the chattels of a tenant left with him with or without his consent until they are demanded by the tenant but not afterwards.<sup>11</sup> An incoming tenant is bound to use only ordinary care in caring for the chattels of an outgoing tenant which he may find upon the premises. He is merely a gratuitous bailee of the chattels. If they are in his way he may, without notice to the owner remove the property left on the premises by a former tenant, if he acts with such care as the nature of the property demands, and if he leaves it in such a condition that the owner by reasonable diligence can take it uninjured, he is not bound to store it until the latter takes possession of.<sup>12</sup> But if the chattels which the incoming tenant removes are of a nature which renders them liable to destruction or deterioration if they are exposed to the weather, it may be his duty to store them at the owner's expense.

**§ 762. The remedies of the parties.** The landlord may maintain an action in detinue or trover for the recovery of specific articles wrongfully removed by the lessee or at his procurement from the demised property during the tenancy.<sup>13</sup> He

<sup>9</sup> *Blackwell v. Baily*, 1 Mo. App. 328.

<sup>10</sup> *Preston v. Neale*, 12 Gray (Mass.) 222, citing *Story on Bailments*, §§44a, 83a, 121a.

<sup>11</sup> *Preston v. Neale*, 12 Gray (Mass.) 222, 224; citing and relying on *Nicholson v. Chapman*, 2

H. Bl. 258; *Reeder v. Anderson*, 4 Dana (Ky.) 193; *Baker v. Hoag*, 3 Barb. (N. Y.) 208.

<sup>12</sup> *United States Manuf. Co. v. Stevens*, 52 Mich. 331.

<sup>13</sup> *Petre v. Ferrers*, 61 Law J. Ch. 426, 65 Law T. (N. S.) 568.

may also bring an action of trover against the tenant to recover the value of any chattel wrongfully severed from the freehold by the tenant during the term.<sup>14</sup> Thus he may bring trover against his tenant during the tenancy for the value of wood into which trees wrongfully severed from the premises by the tenant have been converted.<sup>15</sup> A covenant that a certain improvement erected on the land by a tenant shall, on the expiration of the lease become the property of the lessor on his paying a certain price for it does not give the lessor a right to maintain trover for the property as against the lessee. His remedy against the lessee is in damages in an action for a breach of this covenant.<sup>16</sup> A landlord cannot recover damages on a covenant against waste in the lease,<sup>17</sup> for the unavoidable injury to the premises which results from removing the fixtures which the tenant had a right to remove at the end of the term. If a tenant in removing a building erected by him is doing or threatening to do irreparable injury to the reversion, for which damages will not be adequate compensation to the landlord the latter may obtain an injunction.<sup>18</sup> But the wrongful removal by a tenant of certain articles which were not fixtures but which could be easily removed by him without material injury to the building and whose exact money value is readily ascertainable will not alone justify the court in granting an injunction to restrain further action on the part of the tenant.<sup>19</sup> Where by the terms of a lease a building or other personal property erected on the demised land by the tenant is to be regarded as personal property belonging to the tenant he may remove it. The denial by the landlord of the tenant's right to do this, evidenced by some act on his part, is a conversion of the personal property since it is a wrongful taking of property or an assumption of a right to control or dispose of

<sup>14</sup> Street v. Nelson, 88 Ala. 230; Miller v. Hennessy, 94 N. Y. Supp. 563; Anderson v. Hapler, 34 Ill. 436; Congregational Society v. Fleming, 11 Iowa 533; Mooers v. Wait, 3 Wend. (N. Y.) 104, 108; Mather v. Trinity Church, 3 S. & R. (Pa.) 509; Harlan v. Harlan, 15 Pa. St. 507, 513; Truss v. Old, 6 Rand. (Va.) 556.

<sup>15</sup> Brooks v. Rogers, 99 Ala. 433, 13 So. Rep. 386.

<sup>16</sup> Morgan v. Negley, 3 Pittsb. Rep. (Pa.) 33.

<sup>17</sup> Wall v. Hinds, 4 Gray (Mass.) 256, 273, 64 Am. Dec. 64.

<sup>18</sup> Dougherty v. Spencer, 23 Ill. App. 357.

<sup>19</sup> Loeser v. Liebman, 60 Hun, 579, 14 N. Y. Supp. 569 modified 137 N. Y. 163, 169, 33 N. E. Rep. 147, 137 N. Y. 555, 33 N. E. Rep. 150.

property belonging to another person without his consent.<sup>20</sup> If, during the term the landlord enters and, without the consent of the tenant, takes possession of the premises and removes or otherwise converts to his own use removable trade fixtures which are the property of the tenant the latter may, besides recovering damages for the trespass, bring and maintain trover or conversion against the landlord for the fixtures, or their value unless he has surrendered the premises and abandoned the same.<sup>21</sup> Where a landlord denies the tenant's ownership of the fixtures and wrongfully and unlawfully enters upon the premises before the expiration of the term and takes possession of the fixtures and converts them to his own use the tenant may at once bring an action for trover or conversion to recover the damages sustained by him,<sup>22</sup> and he need not wait to bring his action until the end of the lease when his right to remove the fixtures from the premises will accrue.

**§ 763. The measure of damages to the tenant for the conversion of his chattels by the landlord.** The measure of damages for a breach by a landlord of a covenant to permit his tenant to remove a building from the premises, is the value of the building on the premises on the day when the breach occurred.<sup>23</sup> The measure of damages is the value of the fixtures to the landlord as component parts of the building and not their value as detached from the building and delivered to the tenant by the landlord.<sup>24</sup> The measure of the tenant's damages for the conversion of fixtures by the landlord is the value of the same at the time of conversion with interest to the date of the trial, unless perhaps their value is fluctuating when, as a rule, the highest value of the fixtures at any time between the conversion and the

<sup>20</sup> Neiswanger v. Squier, 73 Mo. 192, 198; Adams v. Goddard, 48 Me. 212, 216; Duff v. Bailey, (Ky. 1906) 96 S. W. Rep. 577; Duffus v. Bangs, 122 N. Y. 423, affirming 45 Hun, 52.

<sup>21</sup> Vilas v. Mason, 25 Miss. 310; Finney v. Watkins, 13 Mo. 291; Rosenan v. Syring, 25 Oreg. 386, 35 Pac. Rep. 844; Smith v. Boyle, 66 (Neb.) 192, 92 N. W. Rep. 1018; Eldridge v. Hoefer, (Oreg.

1904) 77 Pac. Rep. 874; Watts v. Lehman, 107 Pa. St. 106; *Ex parte Hathaway*, 2 Low. (U. S.) 496.

<sup>22</sup> Rosenan v. Syring, 25 Oreg. 386, 35 Pac. Rep. 844; Eldridge v. Hoefer, 45 Oreg. 239, 77 Pac. Rep. 874, 876.

<sup>23</sup> Neiswanger v. Squier, 73 Mo. 192, 199.

<sup>24</sup> Bruce v. Welch, 52 Hun. 524, 5 N. Y. Supp. 668.

trial will be used as a basis for computing damages.<sup>25</sup> The subsequent return of the fixtures by the landlord to the tenant after their conversion goes only to mitigate the damages.<sup>26</sup> In case of a return of the fixtures by the landlord the measure of the tenant's damages will be, at least where special damages are not alleged, the value of the fixtures at the time of the conversion, with interest thereon to the date of the trial, less their value at the time of the return to the tenant with interest thereon from that date, to the trial and not the value of their use to the landlord while in the possession of the landlord.<sup>27</sup>

**§ 764. The measure of the damages for the breach of the landlord's covenant to make improvements.** An agreement by the lessor to erect and place improvements on the premises during the term in the form of a covenant in the lease, for which the payment of rent by the lessee forms the consideration, is valid and may be enforced by the lessee. Nor is the lessee compelled as a condition precedent to make the erection or improvement himself at the expense of the lessor in a case where the lessor refuses or neglects to do as would be the case with repairs, the lack of which may render the premises untenantable. All that the lessor has a right to demand is notice from the lessee to proceed. The lessee is under no necessity to make extraordinary erections and improvements with a certainty of great annoyance and inconvenience to himself and the possibility of loss and consequent damage to his business or to his comfort in the occupancy of the premises. He may continue in possession and pay the rent, after the lessor's failure to build at least where the landlord's failure to make the improvement does not amount to an eviction, and he may recover as the measure of his damages from the lessor the difference between the rental value of the premises with the improvements and without them.<sup>28</sup>

<sup>25</sup> Eldridge v. Hoefer, 45 Oreg. 239, 77 N. W. Rep. 874, 876.

<sup>26</sup> Murphy v. Hubbs, 8 Colo. 17, 5 Pac. Rep. 837; Curtis v. Ward, 20 Com. 204; Bigelow Co. v. Heintze, 53 N. J. Law 69, 21 Atl. Rep. 109.

<sup>27</sup> Gove v. Watson, 61 N. H. 136; Flagler v. Hearst, 86 N. Y. Supp. 398; Eldridge v. Hoefer, 45 Oreg. 239, 77 N. W. Rep. 874, 876.

<sup>28</sup> Pewaukee Milling Co. v. Howitt, 86 Wis. 270, 278, 279, 56 N. Y. Rep. 784; Cook v. Soule, 56 N. Y. 420; Prescott v. Otterstatter, 79 Pa. St. 462. But in Kimball & Co. v. Doggett, 62 Ill. App. 528 the measure of the lessee's damage was said to be the cost of making the improvement, and in Berrian v. Olmsted 4 E. D. Smith (N. Y.) the difference between the

§ 765. **The proof of custom in respect to fixtures.** The courts will recognize a general custom in determining whether certain buildings are or are not fixtures aside from any rule of the common law. Thus, where it is a general custom in a city to permit the lessees of vacant land, which they take upon what are commonly called ground leases, to erect buildings thereon, which may be removed without injury to the freehold, to remove such improvements at or before the expiration, it is held in the absence of any expressed restriction in the lease, that the parties must be presumed to have contracted with reference to this custom, and that hence the lessee may remove his buildings at any time before the lease expires. The custom does not apply where the lease provides for the disposal of the fixtures placed on the premises by the tenant. A provision that the rent should be paid excepting in case of the destruction of the place by fire, and that the tenant shall quit and deliver up the premises at the end of the term, reasonable use, and wear and damage by accidental fire, excepted, does not take the lease out of the custom. For a damage by accidental fire applies only to buildings, and not to land which is indestructible by such means, and this presumption is further strengthened by the fact that the parties used a printed form, which was silent as to buildings, and that the premises were unimproved, and were rented for a small sum, such as would be paid for the use of the ground only.<sup>29</sup>

§ 766. **The right of a tenant who has covenanted to surrender in good condition to remove his improvements.** The covenant of a tenant to repair sometimes requires to be construed with regard to the law of fixtures. The obligation to repair may involve the placing in the premises of an article of personal property, which under ordinary circumstances would be a chattel removable by the tenant at the end of the time. If the tenant in order to repair has to replace a portion of the premises, the material substance which he attaches to the premises is no longer his property, nor a fixture removable by him, being placed by him upon the premises in order to fulfill his agreement to repair. Thus where a tenant being bound to repair attached increased rent the tenant was to pay on account of the improvements and their value. Damages for sickness in the tenant's family and for his loss of crops are too remote to be considered; Turner v. Strange, 56 Tex. 141.

<sup>29</sup> Keogh v. Daniell, 12 Wis. 163, 170, 171.

to the premises a steam-engine in place of one which had been upon the premises, but which had become useless, he was restrained by an injunction, from removing the same at the end of the term,<sup>30</sup> upon his claim that it was a trade fixture. A tenant who covenants to leave the premises in as good condition as when he enters into possession, may remove his improvements or fixtures which he puts in during the term, if after their removal the premises are left substantially in as good condition as they were at the beginning of the term. He cannot remove improvements which he has himself put on the premises if their removal injures the building and prevents its return in as good condition as when he received it.<sup>31</sup> And a tenant who has agreed to return the premises in good repair at the end of the term, may remove fixtures which he finds on taking possession, and replace them before the end of the term, if, in doing this, he makes such necessary repairs as will bring the premises to the condition they were when he entered.<sup>32</sup> If he does not do this he will be liable for a breach of his covenant to return the buildings in good condition. So, the tenant's covenant to leave the premises in as good condition as they are at the execution of the lease, or may be made by improvements, will prevent him from removing buildings or other improvements which he has erected upon the leased land.<sup>33</sup> A lessee who has a right under his lease to remove, at the expiration of his term, machinery or other chattels placed in the premises during the term is liable if he removes other fixtures not placed there by him. He must use care and caution in removing the chattels so as not to cause unnecessary injury to the freehold, and if he does this he is not liable for any damages which may be caused. For in giving the lessee the right to remove articles attached to the premises, the lessor, by implication, waives all claims for damages resulting to his property by their careful removal.<sup>34</sup>

<sup>30</sup> Sunderland v. Newton, 3 Sim. 450. See Kimpton v. Eve, 2 Ves. & B. 349, 13 R. R. 116.

<sup>31</sup> Murray v. Moross, 27 Mich. 203.

<sup>32</sup> Fox v. Lynch, (N. J. Eq. 1906) 64 Atl. Rep. 439.

<sup>33</sup> Carver v. Gough, 153 Pa. St. 225, 25 Atl. Rep. 1124, 32 W. N. C. 72.

<sup>34</sup> Hunt v. Potter, 47 Mich. 197.

## CHAPTER XXX.

### THE TENANT'S EMBLEMMENTS.

- § 767. Emblements defined; the right of the tenant to emblements
- 768. The determination of an uncertain term by the act of the tenant.
- 769. The tenant's right to remove crops where his term is certain.
- 770. The proof of custom in relation to the tenant's crops.
- 771. The distinction between emblements and the cost of preparing the land.
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- 777. The right of a purchaser of a growing crop.
- 778. Title to crops as against mortgagee and purchaser at a foreclosure sale.
- 779. The knowledge by a tenant of an action to foreclose his landlord's title.
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- 781. The tenant's title to an increase of live stock on the premises.
- 782. The effect on emblements of the forfeiture of a lease by the breach of a condition.
- 782. The right of an outgoing tenant to the manure made on a farm.
- 783. The right to manure which was made on non-agricultural land.
- 784. The tenant's covenant as to the disposal of the manure.
- 785. Trees growing upon the soil during the tenancy.
- 786. The remedy of the landlord.
- 787. The criminal element in the tenant removing a crop.

§ 767. **Emblements defined; the right of the tenant to emblements.** The right of the tenant to emblements signifies a right where he holds farmland for an uncertain term and the term has expired without fault on his part, to take away the crops which are then growing upon the land with the right to hold possession for a reasonable period for the purpose of removing these crops. All crops growing upon the land which are the result of the labor of the tenant are included within the term emblements.<sup>1</sup> In common law a distinction was made between

<sup>1</sup> Co. Litt. 55 b. n. 1; Latham v. Atwood (growing hops), Cro. Car. 515.

those products of the earth which are produced annually and are raised by yearly planting and labor, or in other words, which owe their annual existence to the art and labor of man; and those products of the soil, such as fruit, trees, bushes and grass growing from perennial roots. That is to say, the former class of products of the earth which are the product of annual labor may be emblements, but the latter class, which are not the product of annual labor, are not regarded by the law as emblements.<sup>2</sup> Thus, for illustration, grain and vegetables which require annual planting and cultivation may be emblements, but grass and grapes and apples and fruit generally, which grow on trees and are not planted annually are not emblements. It has been held that hops, though growing from old roots, as it requires annual cultivation, comes under the head of emblements. The rule is that where the tenancy is for an uncertain term, and it is determined by an act of the landlord, or by the act of God, or by the law, the tenant who has sown an annual crop upon the demised premises during the term is entitled to the crop then growing. If the crop then growing is not ready to be harvested when the term expires he may, both as against his landlord and as against the subsequent tenant, enter upon the land to harvest the same.<sup>3</sup> The rule re-

<sup>2</sup> Sparrow v. Pond, 49 Minn. 412, 418; citing 4 Kent, Comm. p. 73, 4 Bac. Apr. 2, tit. "Emblements"; Schouler Personal Property, 100; State v. Gemmill, 1 Houst. (Del.) 9; Craddock v. Riddleberger, 2 Dana (Ky.) 205; Rodwell v. Phillips, 9 Mee. & Well. 501; Adams v. Smith, 1 Ill. 221; Slocum v. Seymour, 36 N. J. Law 139, 13 Am. Rep. 432; Owens v. Lewis, 46 Ind. 488.

<sup>3</sup> Price v. Pickett, 21 Ala. 741, 744; Templeman v. Biddle, 1 Har. (Del.) 522; Morgan v. Morgan, 65 Ga. 493; Davis v. Thompson, 13 Me. 209, 215; Sherbourne v. Jones, 20 Me. (pt. 1) 70; Brown v. Thurston, 56 Me. 126, 128, 96 Am. Dec. 438; Towne v. Bowers, 81 Me. 491; Rising v. Stannard, 17 Mass. 282; Browne v. Turner,

60 Mo. 21; Davis v. Brocklebank, 9 N. H. 73; Howell v. Schenck, 24 N. J. Law, 89, 93; Carle v. Monkhouse, 47 N. J. Eq. 73; Whipple v. Foot, 2 Johns (N. Y.) 418; Whitmarsh v. Cutting, 10 Johns. 360; Stewart v. Doughty, 9 Johns. (N. Y.) 108; Pfanner v. Sturmer, 40 How. Pr. (N. Y.) 401; Harris v. Fruck, 49 N. Y. 24, 10 Am. Rep. 318; Cassily v. Rhodes, 12 Ohio 88; *In re Jacquette's Estate*, 13 Lanc. Bar. (Pa.) 13; Bettinger v. Baker, 29 Pa. St. 66, 70 Am. Dec. 154; Debon Vandoren v. Everitt, 5 N. J. Law, 460; Sanders v. Ellington, 77 N. Car. 255, 258; Kingsbury v. Collins, 4 Bing. 202, 1 Cruise on Real Property Title 9, c. 1, § 14, 4 Kent's Com. 110, Co. Litt. 55b, Com. Dig. Biens Ct. 1, 2; 2 Bl. Com. 122.

garding emblements applies in all cases where the tenancy is of uncertain duration. It is recognized in case of a tenancy at will or of a tenancy for life. The representative of a tenant for life may, on the death of his life tenant, have the crops growing on the land at the death of the life tenant as against a reversioner or remainderman. The tenancy of a life tenant having been determined by an event, that is to say, his death, over which the tenant had no control, his next of kin shall not suffer thereby.<sup>4</sup> But the principle of emblement applies only to one year's crops. Thus where a tenant for an indefinite period which was terminated on November 1, 1873, had sown a crop of oats in November, 1872, and which he had harvested in June, 1873, and thereafter, and in the same summer, he had plowed in the stubble and raised another crop which was growing when the lease was terminated it was held that, although the two crops were the result of his labors, it did not constitute emblements which he had a right to harvest after the lease expired.<sup>5</sup> So where a farm is leased in the spring

<sup>4</sup>Co. Litt. 55 b; Knevett v. Poole, Cro. Eliz. 463.

<sup>5</sup>Henderson v. Cardwell, 9 Bax. (Tenn.) 389, in which the court said, "When the tenancy is of uncertain duration and is terminated by the landlord after the crop is sown, but before it is severed from the freehold, the tenant or his representative shall be entitled to one crop of that species only which ordinarily repays the labor by which it is produced within the year in which that labor is bestowed, though the crop may in extraordinary seasons be delayed beyond that period. But he is not entitled to all the fruits of his labor, as such right might be extended to things of a more permanent nature such as trees or more crops than one, since the cultivator very often looks for a compensation for his capital and labor in the produce of successive years. Such is the law as stated

in Broom's Leg. Max. 236, 394. The crop claimed in this case is ordinarily an annual crop, but the plaintiff harvested the first year's product of the sowing, and claims a second year's crop of the same sowing. True, he bestowed additional labor to produce this second crop, but as we understand the rule as above stated, it goes no further than to give the tenant the benefit of the law of emblements, so as to secure to him the benefit of the annual crop sown by him before the termination of his term. If this second crop of oats had grown without labor by the plaintiff, he could not have been entitled to it after the expiration of his term, as he had already harvested the crop sown by him and the additional labor bestowed upon it does not change the result. The crop claimed matured in 1874, was sown in November 1873. Plowing in the stubble, we think, is

for a year the custom which allows a tenant to enter and reap emblements does not apply to a second crop sown in the spring immediately before the lease expires but only to crops which have been sown in the customary course of husbandry during the term. The latter crop is regarded as a crop in the second year and can only be reaped by the tenant where the tenant holds over for that year and is recognized as a tenant by the landlord.<sup>6</sup>

**§ 768. The determination of an uncertain term by the act of the tenant.** The tenant of a term which is uncertain as to its duration is entitled to emblements upon its termination

not equivalent to sowing another crop, though it produce the same result. The policy of the rule is the encouragement of the tenant in the cultivation of the soil, and is satisfied in giving him, after the termination of his term, the produce of his annual crop sown by him. See, also *Baker v. McIntruff*, 49 Mo. App. 505.

<sup>6</sup> *Howell v. Schenck*, 24 N. J. Law, 89, 93; *Demi v. Bosler*, 1 P. & W. (Pa.) 224, Blackstone refers the origin of the common law principles of emblements to the feudal system. At the common law if a tenant for life, having sowed the land, died before harvest, his personal representatives would have a right to reap the crop; because it is said that the interest of the life tenant should not be prejudiced by a sudden determination of the estate. The life estate was ended by the act of God and it is said to be a maxim of the law that *actus Dei nemini facit injuriam*. The reason given is somewhat fanciful for it is very manifest that the uncertainty of the termination of a life estate can furnish no valid foundation for the doctrine of emblements since the tenant must

necessarily be fully informed as to the uncertainty of life. The reasons further stated that the rule as to emblements was based upon the principle that the tenant, having sowed and tilled, should have the profits of his labor is more reasonable. And moreover the doctrine of emblements was for the encouragement of husbandry which being a public benefit, tending to the increase and plenty of provisions ought to have the utmost privilege and security that the law can give to it. By the feudal law if a tenant died between the beginning of September and the end of February, the lord, who was entitled to the reversion might also take the profits for the whole year; but if he died between the beginning of March and the end of August the heirs of the tenant took the profits. So where a man is tenant for the life of another and the *cestui qui vie* shall die, the heirs of the tenant for life shall have emblements. The same rule applies where the life estate is terminated by the act of the law as where land is given to a man and wife during coverture which gives them a determinable estate for life and the

only when such termination is caused by the act of the landlord, the act of God or the act of the law. If his estate is terminated between seed time and harvest by his own act he loses his emblems and a crop then growing on the land passes with it to that person who becomes the owner of the land.<sup>7</sup> The right of the tenant to emblems may be lost by his voluntary abandonment of the demised premises and the acceptance of the surrender of the same by the landlord.<sup>8</sup> Where a tenant, with no intention to return, abandons the premises and by so doing surrenders them to the landlord who thereupon enters while crops are growing, and while further labor and expense must be employed both to cultivate and to gather such crops, it will be conclusively presumed that he intended to abandon his title to the growing crops to the landlord. The landlord having entered and cultivated and gathered the crops has an absolute title thereto as against the tenant.<sup>9</sup> Thus where premises were rented for one year with the privilege of a renewal and the property having been sold, the ten-

husband obtains an absolute divorce. In such case the husband shall have emblems.

<sup>7</sup>Debow v. Colfax, 10 N. J. L. 128, 129; Shep. Touch. 451; Co. Litt. 55; Maclary v. Turner, 9 Houst. (Del.) 281; Oland's Case, 5 Coke, 116a. This case arose under the following circumstances, A woman, having an estate during widowhood, having sowed a crop, remarried. The question arose whether the husband or the landlord or reversioner should have the crop, and it was determined that the crop should go to the reversioner because the tenant for life had determined the estate herself. See, also, Bulwer v. Bulwer, 2 B. & Ad. 470; in which, among other things, it was said "The general rule of law applicable to cases of this description is that where a tenant of land has an uncertain interest which is determined by the act of God, or the act of another, there

he shall have the emblem; but that is not so when the tenancy is determined by his own act. That is laid down in a variety of instances which will be found in Comyn's Digest, Vol. 1, p. 661."

<sup>8</sup>Carpenter v. Jones, 63 Ill. 517; Carney v. Mosher, 97 Mich. 554, 56 N. W. Rep. 935; Debow v. Colfax, 10 N. J. Law, 128; Bain v. Clark, 10 Johns. (N. Y.) 424; Dircks v. Brant, 56 Md. 500, 503; Dillon v. Wilson, 24 Mo. 278, 280.

<sup>9</sup>Shahan v. Herzberg, Simpson & Co., 73 Ala. 59, 64. The right to enter and reap a crop after the end of the term being an interest in land within the Statute of Frauds a parol lease of land for one year with an oral agreement that the lessee may sow the land will not give the lessee any right to enter after the end of the term and harvest the crop. Carney v. Mosher, 97 Mich. 554, 556, 556 N. W. Rep. 935.

ant voluntarily abandons the land during the first year, he is not entitled to emblements in the absence of an express agreement.<sup>9a</sup> So where a tenant at will having sown a crop elects to terminate the tenancy at will by giving notice of his intention to do so, he cannot claim crops as against his lessor. So also where a woman having an estate for her widowhood, which may possibly be an estate for life, sows a crop on the land and marries before reaping it, the crop belongs to the owner of the land, not to her or to her husband. The same rule or principle is applicable to determine the ownership of crops where a tenant for life incurs a forfeiture by committing waste and thereby the lessor or reversioner enters and terminates the life estate.<sup>9b</sup> Upon the surrender of farm land to the landlord a crop growing on the land becomes at once the property of the landlord though it had been planted and cultivated by the tenant. The landlord, on accepting a surrender, not only succeeds to the mere use and occupancy of the land but he succeeds to all rights and interests which the tenant had in it. The growing crop is an incident of the land and passes to the landlord on the termination of the tenancy by the surrender in the absence of an express agreement to the contrary.<sup>10</sup> This rule applies only to crops growing on the land at the date the tenant terminates the estate at will, for if before that time he has severed the crops so that they are personal property owned by him, he has a reasonable time in which to remove them after he has determined the estate.<sup>11</sup> On the other hand, where the tenant at will has received notice that the landlord has terminated the tenancy and then sows a crop, he is not entitled to sever the crop or to remove it when it has been severed.<sup>12</sup>

<sup>9a</sup> Diercks v. Brant, 56 Md. 500.

<sup>9b</sup> Oland v. Burdwick, Cro. Eliz. 461. The fact that a tenant for a term which is certain as for example a tenant for a year has an option for an extension or a renewal does not take his case out of the rule. This is only a privilege and not an estate. He may lose it or waive it by his surrender of the premises. Dircks v. Brant, 56 Md. 500, 503.

<sup>10</sup> Shaham v. Hertzberg, 73 Ala. 59, 64.

<sup>11</sup> Sheppard's Touchstone, 244; Debow v. Colfax, 10 N. J. Law, 128.

<sup>12</sup> Stewart v. Doughty, 9 Johns. (N. Y.) 108; Prior v. Picket, 21 Ala. 741. "The reason of this, for the estate of the lessee is uncertain, and therefore lest the ground should be unmanured, which should be hurtful to the commonwealth he shall reap the crop which he sowed in peace; albeit the lessor doth determine the will before it be ripe. And so it is if

§ 769. **The tenant's right to remove crops where his term is certain.** By common law if a tenant for years or from year to year sows his land and crops are growing at the end of his term he cannot claim them or remove them as emblements, for he knows when his term will end and must abide by his lease.<sup>13</sup> It is folly for him to sow a crop which he knows he will not be able to reap during his term.<sup>14</sup> The parties may ex-

he set roots, or sow hemp or flax, or any other annual profit if after the same be planted, the lessor oust the lessee; or if, the lessee dieth yet his executors shall have that year's crop; But if he plant young fruit trees, or young oaks, ashes, elms, etc., or sow the ground with acorns, etc. then the lessor may put him out, notwithstanding because they will yield not present annual profit. And this is not only proper to a lessee at will, that when the lessor determines the will, that the lessee shall have the corn sown, but to every particular tenant that hath an estate uncertain \* \* \* And therefore if tenant for life soweth the ground, and dieth, his executors shall have the corn, for that his estate was uncertain and determined by the act of God. And the same law is of the lessee for years of tenant for life." Coke Litt. 55b.

<sup>13</sup> Stultz v. Dicke, 5 Binn. (Pa.) 285, 293; Carmine v. Bowen, 104 Md. 198, 64 Atl. Rep. 932, 6 Am. Dec. 411; Gossett v. Drydale, 48 Mo. App. 430; Sharp v. Kinsman, 18 S. Car. 108, 115; Mason v. Moyers, 2 Rob. (Va.) 606; Harris v. Carson, 7 Leigh (Va.) 632, 30 Am. Dec. 510, 511.

<sup>14</sup> Sanders v. Ellington, 77 N. Car. 255, 258; Whitmarsh v. Cutting, 10 Johns. (N. Y.) 360. "With regards to emblements, or

the profits of lands sowed by tenant for years, there is this difference between him and tenant for life; that where the term of tenant for years depends upon a certainty, as if he holds from midsummer for ten years, and in the last year he sows a crop of corn, and it is not ripe and cut before midsummer, the end of his term the landlord shall have it; for the tenant knew the expiration of the term, and therefore it was his own folly to sow what he could never reap the profits of. But where the lease for years depends upon an uncertainty; as, upon the death of the lessor being himself tenant for life, or being a husband seized in the right of his wife; or if the term of years be determinable upon a life or lives; in all these cases the estate for years not being certainly to expire at a time foreknown but merely by the act of God, the tenant or his executors, shall have the emblements in the same manner that a tenant for life or his executors shall be entitled thereto. Not so if it determine by the act of the party himself; as if tenant for years does anything that amounts to a forfeiture; in which case the emblements shall go to the lessor and not to the lessee, who hath determined the estate by his own default." 2 Black, 145.

pressly agree between themselves that the tenant, though his term is certain, shall have the right to remove the crops at its end. This right, as is elsewhere stated, is sometimes created by custom. In the absence of a custom the right in the tenant to remove the crops will not be created by mere implication. Thus, a right to remove crops will not be conferred upon the tenant by implication arising from an agreement on his part "to farm the fields in rotation, in a proper manner," though such an agreement will bind him to sow wheat and rye in the fall of the year before the term ends, which, under the lease, was on the first day of March following.<sup>15</sup> A tenant may lose his right to remove the crops conferred upon him by an express agreement in the lease by abandoning the premises during the term.<sup>16</sup> While nothing short of custom or an express agreement will permit a tenant for a fixed term to remove his crops at the end thereof, in a court of law yet in equity under circumstances constituting an estoppel upon the landlord, his rights may probably be more extensive. So, the landlord who knows his tenant is sowing a certain crop on a farm, who stands by and to whom the tenant, while sowing that crop, remarks that he does not expect that he will have any trouble to harvest it after the term shall expire, will be estopped in equity at least from preventing the tenant from entering upon the land to harvest the crop where it matures after the lease is at an end.<sup>17</sup> It is always advisable that the stipulation giving the tenant the right to enter and harvest a crop after the lease has expired shall be contained in the lease itself or a parol agreement by the parties to the lease made during the term if on a good consideration is valid.<sup>18</sup> A parol agree-

<sup>15</sup> Carmine v. Bowen, 104 Md. 198, 64 Atl. Rep. 932.

<sup>16</sup> Hatfield v. Lawton, 108 App. Div. 113, 95 N. Y. Supp. 451.

<sup>17</sup> Carmine v. Bowne, 104 Md. 198, 64 Atl. Rep. 932.

<sup>18</sup> A tenant paid rent for a farm for three years. His lease bound him to farm the fields in rotation. After notice to quit at the end of the term the lessor wrote the lessee a letter in which he told him that he should claim as lessor the crop which the lessee was then

preparing to sow and also calling the attention of the lessee to his failure to sow grass seed as agreed in the lease. It appeared that prior to the date on which the lessor learned that the lessee refused to sow grass seed he made no claim to the crop. On receiving the letter from the lessor the lessee sowed the grass seed and while doing so remarked to the lessor that he (the lessee) anticipated no trouble in cutting the crop he was then sowing to which

ment between the landlord and a tenant from year to year that if he sows wheat he may re-occupy the premises after the term has expired for the purpose of harvesting the wheat if founded upon a sufficient consideration, is not invalid under the statute of frauds, for it is competent under the statute for the landlord to lease the land by parol for less than a year, and this is the effect of such an agreement. But a mere agreement on the part of the tenant to leave crops upon the ground corresponding to those which were growing when he took possession is not sufficient consideration for a promise on the part of the landlord that if he sows such crops he may harvest them after the term.<sup>19</sup>

**§ 770. The proof of custom in relation to the tenant's crops.** The rule of the common law that a tenant for years or from year to year cannot claim crops growing on the land at the end of the term is subject to an exception where there is a custom to the contrary. In England it was held at a very early date that the tenant of a farm for a fixed period was entitled to emblements where such was the custom of the county though the lease was for a term certain in writing and under seal.<sup>20</sup> In the United States a general custom may be proved by parol to confer on the tenant in like circumstances the right to emblements where the lease itself is silent on this question.<sup>21</sup> And usually a strictly

remark the lessor made no reply. Having then been silent when in conscience he ought to have spoken he will be estopped to speak when in conscience he ought to be silent. For it is very evident from the case as it is reported that both parties expected the tenant to have the crop and that the landlord's claim was an after thought based on the tenant's refusal to sow grass seed. Carmine v. Bowen, 104 Md. 198, 64 Atl. Rep. 932.

<sup>19</sup> Ladd v. Brown, 94 Mich. 136, 140. So where a tenant refuses or neglects to pay rent and, some time before the expiration of the lease, voluntarily abandons the premises, and the landlord enters thereon the crops standing un-

reaped at the date of the abandonment belong to the landlord who may successfully resist an action of trover brought against him by the tenant or by the assignee of the tenant. Carney v. Mosher, 97 Mich. 554, 556, 56 N. W. Rep. 935.

<sup>20</sup> Wigglesworth v. Dallison, Doug. 201. Lord Mansfield said in that case, "The custom of a particular place may rectify what otherwise would be imprudence or folly. The lease being by a deed does not vary the case. The custom does not alter or contradict the agreement in the lease; it only superadds a right which is consequential to the taking."

<sup>21</sup> Corle v. Monkhouse, 47 N. J. Eq. 73, 75, 20 Atl. Rep. 367;

local custom by which the tenant is permitted to remove crops after his term has expired may be proved.<sup>22</sup> The burden of proof of such custom, however, lies with the party who claims it.<sup>23</sup> In all cases where the lease is silent as to the title of the crops at the end of the term or as to the right to remove them by the tenant when the term expires the custom may be proved. If the custom is inconsistent with the terms of the lease it cannot usually be proved.<sup>24</sup> A custom of this kind has repeatedly been held to be good and reasonable, particularly in the case of a tenancy from year to year of agricultural land.<sup>25</sup> It is not necessary to show in a case of custom of this kind that it has always existed for a custom or usage prevalent in a neighborhood for a considerable length of time which was known to the parties is sufficient. This custom in any case is based upon justice and equity and tends to the promotion and protection of agriculture which has always been generally favored by the courts. Where, by custom or the terms of the lease the tenant has a right to retain the possession of a part of the premises after the end of the term for the purpose of removing crops, his possession will be in effect a prolongation of the term. While the tenant is thus in possession the landlord may distrain for rent.<sup>26</sup> Or the tenant holding over may maintain trespass,<sup>27</sup> or defend an action of trespass brought by an incoming tenant.<sup>28</sup> There can be no reason why proof of well recognized and established customs which are allowed to be

*Stultz v. Dickey*, 5 *Binn. (Pa.)* 285, 293; *Biggs v. Brown*, 2 *S. & R. (Pa.)* 14.

<sup>22</sup> *Templeman v. Biddle*, 1 *Har. (Del.)* 522; *Dorsey v. Eagle*, 7 *G. & J. (Md.)* 321, 332; *Van Dorens v. Everett*, 5 *N. J. Law*, 460, 463, 8 *Am. Dec.* 615; *Foster v. Robinson*, 6 *Ohio St.* 90, 96; *Carson v. Blazer*, 2 *Binn. (Pa.)* 475, 4 *Am. Dec.* 463; *Biggs v. Brown*, 2 *S. & R. (Pa.)* 14; *Van Ness v. Pacard*, 2 *Peters (U. S.)* 148.

<sup>23</sup> *Webb v. Plummer*, 2 *B. & Ad. 746*; *Roberts v. Barker*, 1 *Cr. & M. 808*; *Clark v. Roystone*, 13 *Mee. & Wel.* 752.

<sup>24</sup> *Holding v. Pigott*, 7 *Bing.* 465; *Hutton v. Warren*, 1 *M. & W.* 466;

*Flaviell v. Gaskoin*, 7 *Exch.* 273; *Muncey v. Dennis*, 1 *H. & N.* 216.

<sup>25</sup> *Clark v. Banks*, 6 *Houst. (Del.)* 584; *Van Dorens v. Everett*, 5 *N. J. Law*, 460, 463. In which case the court very aptly says, "He pays a year's value, he bestows a year's labor, he must sow in its season or not at all, he must eat in winter as well as in summer." *Wigglesworth v. Dallison*, 1 *Doug.* 201; *L. Smith, L. C.* 453; *Beavan v. Dalahay*, 1 *H. Bl.* 5; *Boraston v. Green*, 16 *East.* 71.

<sup>26</sup> *Beavan v. Delahay*, 1 *H. Bl.* 5; *Knight v. Bennett*, 4 *Bing.* 364.

<sup>27</sup> *Beaty v. Gibbon*, 16 *East.* 116.

<sup>28</sup> *Griffiths v. Puleston*, 13 *M. & W.* 358.

proved to enable the courts to construe ordinary mercantile contracts in writing should not also be received to show the true intention of the parties to a lease.<sup>29</sup> Nor is an allegation of bad husbandry by a tenant any defense against his claim to emblements by custom though it may furnish the basis of a suit for damages for a breach of an implied covenant.<sup>30</sup>

**§ 771. The distinction between emblements and the cost of preparing the land.** The common law has established a distinction as to the rights of a tenant, between the right to emblements and the right to be compensated for the expense of plowing and manuring the soil. The right to emblements does not exist until the seed has been sown and the crops planted. It is the compensation which the tenant of the uncertain estate has belonging to him for labor expended on the crops. Hence, if the tenant, after plowing and manuring a field and otherwise preparing it for cultivation, is ousted from the possession before he plants the crops, he loses all the expenses of plowing and the other labor for preparing the field, though if he is ousted by the landlord after he has planted the seed he will be entitled to the crops as emblements and will also be entitled to enter and harvest them.<sup>31</sup>

**§ 772. The right of the incoming tenant to growing crops.** The general rule as to the ownership of crops growing upon the land is that from the time of their planting until they are severed from the land they are part of the soil and pass with the latter by a conveyance of the land unless reserved expressly or by necessary implication arising from the special circumstances.<sup>32</sup> Hence it follows from these general rules that a lease

<sup>29</sup> *Foster v. Robinson*, 6 Ohio St. 90, 97.

<sup>30</sup> *Clark v. Harvey*, 54 Pa. St. 142.

<sup>31</sup> *Bro. Ab. Title "Emblements;" Price v. Pickett*, 21 Ala. 741, 744; *Stewart v. Doughty*, 9 Johns. (N.Y.) 108, 112.

<sup>32</sup> *Wilkinson v. Ketler*, 69 Ala. 435; *Gibbons v. Dillingham*, 10 Ark. 9, 50 Am. Dec. 233; *Kinsman v. Kinsman*, 1 Root (Conn.) 180; *Potts v. Hendrix*, 6 Ga. 452; *Powell v. Rich*, 41 Ill. 466; *Damery v.*

*Ferguson*, 48 Ill. App. 224; *Talbot v. Hill*, 68 Ill. 106; *Chapman v. Long*, 10 Ind. 465; *Heavilon v. Heavilon*, 29 Ind. 509; *Turner v. Cool*, 23 Ind. 56, 85 Am. Dec. 449; *Chapman v. Veach*, 32 Kan. 167, 4 Pac. Rep. 100; *Smith v. Leighton*, 38 Kan. 544, 17 Pac. Rep. 52, 5 Am. St. Rep. 778; *Foster v. Fletcher*, 7 T. B. Mon. Ky. 534, 18 Am. Dec. 208; *Porche v. Bodin*, 28 La. Ann. 761; *Bludworth v. Lambeth*, 9 Rob. (La.) 256; *Tripp v. Hasceig*, 20 Mich. 254, 4 Am.

of a farm in general terms with a right to an immediate possession in the tenant carries the right to him to all crops growing thereon at the date of the lease, unless the same are reserved in the lease to the lessor. The lease is an entire contract and by implication conveys everything on the land. It makes the lessee a purchaser of the growing crops with a right to harvest them when they mature.<sup>33</sup> Under the general rule that the tenant is vested by the lease with all rights incident to the possession and enjoyment of land an incoming tenant is unquestionably entitled to a crop-growing on the demised premises at the date of the execution of the lease unless the title to the same is reserved to the landlord.<sup>34</sup> The tenant may pasture his cattle upon grass growing on the land when he signs the lease or may harvest it for his own use. So, also, he may harvest a crop of wheat which is growing on the land when he enters, which matures during his term.<sup>35</sup> But

Dec. 388; *Coman v. Thompson*, 47 Mich. 22, 10 N. W. Rep. 62, 41 Am. Rep. 706; *Erickson v. Patterson*, 47 Minn. 525, 50 N. W. Rep. 699; *Terhune v. Elberon*, 3 N. J. Law, 297; *Foot v. Calvin*, 3 Johns. (N. Y.) 750; *Beach v. Barons*, 13 Barb. (N. Y.) 305; *Baker v. Jordan*, 3 Ohio St. 438; *Bittinger v. Baker*, 29 Pa. St. 66; *Backenstoss v. Stahler*, 33 Pa. St. 251, 75 Am. Dec. 592; *Bear v. Bitner*, 16 Pa. St. 175, 55 Am. Dec. 490; *Burnside v. Weightman*, 9 Watts (Pa.) 46; *Pickens v. Reed*, 1 Swan. (Tenn.) 80; *Willis v. Moore*, 59 Tex. 628, 46 Am. Dec. 284; *Lombardi v. Shero*, 14 Tex. Civ. App. 594, 37 S. W. Rep. 613; *Engle v. Engle*, 3 W. Va. 246; *Westcott v. Delano*, 20 Wis. 514. A subsequent chattel mortgage of the crops from the lessor has no claim as against the lessee. *Coman v. Thompson*, 47 Mich. 22, 10 N. W. Rep. 699. A lessor may show that the crops were resowed by a parol agreement though the lease be

in writing. Such a reservation is a severance of the crops. Though a reservation of crops may be by parol a reservation of trees or similar natural products of the land must be in writing under the Statute of Frauds. *Backenstoss v. Stahler*, 33 Pa. St. 251.

<sup>33</sup> *Edwards v. Perkins*, 7 Oreg. 149, 156; *Emery v. Fugina*, 68 Wis. 505, 32 N. W. Rep. 236.

<sup>34</sup> *Martin v. Knapp*, 57 Iowa 336, 10 N. W. Rep. 721.

<sup>35</sup> *Emery v. Fugina*, 68 Wis. 505, 507, 32 N. W. Rep. 236; *Edwards v. Perkins*, 7 Oreg. 149, 156. The same rule is applicable to an oral lease. *Hosli v. Yokel*, 57 Mo. App. 622. Timothy is an annual crop and may therefore be sold as personal property. If an oral lease be made of the land while such a crop is growing thereon, the crop passes to the lessee in the absence of a reservation of it by the lessor. *Hosli v. Yokel*, 57 Mo. App. 622

there can be no doubt that the ownership of, or an interest in, growing crops can be vested in one person at the same time that the title to and interest in the fee continues vested in another. The presumption is that he who owns the soil also owns the crop growing upon it, but this presumption is always rebuttable,<sup>36</sup> and readily yields to evidence of an express agreement to the opposite effect or to proof of circumstances which render it unfair and inequitable to assume that the owner of the land is also owner of the crops growing upon it. As between the grantee and the grantor of the land a conveyance of the land, except in certain special cases, carries title to the crops growing thereon at the time of taking title. The grantor may, by appropriate language inserted in the deed of conveyance, reserve a growing crop, and the grantee will be bound thereby by reason of his acceptance of the deed. Or the grantor may, by some arrangement with a third party made prior to the conveyance, have created such a lien upon and possession of the growing crops upon his land as will, either by actual or constructive notice thereof coming to the grantee, deprive the latter of all right to claim the crops and destroy the right which the purchaser would have had if such prior arrangement had not been made. Thus, if the land be leased to a tenant at the time of the passing of title, the possession of the latter will be notice to the purchaser of the tenant's ownership of the crops then growing thereon, and he will then be bound to inquire who owns the crops and liable to any rights of the tenant in the crops which he might have ascertained by reasonable inquiry.<sup>37</sup> So, if by the terms of the lease it is expressly agreed that a crop sown upon the land shall remain the property of the tenant, no title to the crop passes to the grantee of the landlord.<sup>38</sup>

**§ 773. The tenant's title to the crops during the term.** As against the landlord a tenant has an absolute title to all crops growing on the premises during the term in the absence of an express agreement to the contrary.<sup>39</sup> So, in the absence of an

<sup>36</sup> *Walton v. Jordan*, 65 N. Car. 170. 5 La. Rep. 591; *Robinson v. Kruse*, 29 Ark. 575; *Cheney v. Bonnell*,

<sup>37</sup> See *Simanek v. Nemetz*, 120 (Wis.) 42, 97 N. W. Rep. 508, 509. 58 Ill. 268; *Perry v. Hamilton*, 138 Ind. 271, 273, 35 N. E. Rep. 286;

<sup>38</sup> *Harman v. Cargill*, (Mo.) 73 S. W. Rep. 1101. 119 Ind. 249, 253; *Heavilon v. Farmers' Bank*, 81 Ind. 249, 253; *Chicago etc. Railway Co. v. Linard*, 94 Ind. 319,

<sup>39</sup> *Albright v. Mills*, 86 Ala. 324,

express agreement to the contrary, a lessee is entitled to reap crops growing on the land at the date of his entry, which mature during the term,<sup>40</sup> and may then sell or mortgage the same. So a lease of farm lands conveys not only the right to cultivate them as such, but also the right to the ownership and possession of the fruit on trees thereon which matures during the lease.<sup>41</sup> This rule is applicable to a case where the tenant had agreed to pay by way of rent "the annual sum of one-half the income of said farm." For this is not a lease or arrangement to cultivate land on shares. The lessor has no lien on the crop nor can he demand that the rent shall be paid in the products of the farm. The lessee may sell the crops and the proceeds belong to him and he owes the lessor a sum equivalent to one-half the income at the end of the year.<sup>42</sup> So, too, in every case where the relation of land and tenant is proved to exist, the title to the crop remains in

328; Holderman v. Smith, 3 Kan. App. 423, 43 Pac. Rep. 272; Chesley v. Welsch, 37 Me. 106, 109; Willey v. Conner, 44 Vt. 68; Wolcott v. Hamilton, 61 Vt. 79, 17 Atl. Rep. 39; McLellan v. Whitney, 65 Vt. 510, 27 Atl. Rep. 117; Felch v. Harriman, 64 N. H. 472, 13 Atl. Rep. 418; Porche v. Bodin, 28 La. Ann. 761; Sandel v. Douglas, 27 La. Ann. 629; Lewis v. Klotz, 39 La. Ann. 259, 1 So. Rep. 539; Dockham v. Parker, 9 Me. 137, 23 Am. Dec. 547; Wink v. Early, 104 Mo. App. 85, 78 S. W. Rep. 343; Pickens v. Webster, 31 La. Ann. 870; Rowlands v. Voechting, 115 Wis. 352, 91 N. W. Rep. 990; Simanek v. Nemetz, 120 Wis. 42, 97 N. W. Rep. 508, 509. An agreement between the parties to a lease for two years that the title to the crops shall vest and remain in the landlord until the rent is fully paid is not void as a sale of things not *in esse* because it includes crops not planted. It is merely a reservation for the benefit of the landlord. Vaughn v. Howell, 82 Ga. 336, 9 S. E. Rep.

173; Woodcock v. Carlson, 41 Minn. 542, 43 N. W. Rep. 479; Doremus v. Howard, 23 N. J. Law 390. In many cases of agreements to work land on shares as it is termed, *i. e.* where the landlord is to receive as compensation for the use of the land a portion of the produce which is raised upon it the parties to the agreement may be properly considered tenants in common of the crop. But where the intention of the parties is to create a lease properly so called it is not material that besides a money rent the landlord is to be compensated by a share of the crops. In such cases where the landlord's share is to be determined at some future date the tenant has title and a right to the possession until that date. Chicago etc. R. Co. v. Linard, 94 Ind. 319, 329.

<sup>40</sup> Emery v. Fugina, 68 Wis. 505, 508, 32 N. W. Rep. 236.

<sup>41</sup> Quiggle v. Vining, 125 Ga. 98, 54 S. E. Rep. 74.

<sup>42</sup> McLellan v. Whitney, 65 Vt. 510, 512, 27 Atl. Rep. 117.

the tenant during the term though it is provided that the landlord is to receive a share of the income of the farm as rent, or even a share of the products of the farm *in specie*.<sup>43</sup> He may recover, in his own name, the crops or damages for their conversion by an appropriate action either against his landlord or a third person who, without his consent, has appropriated them.<sup>44</sup> This rule is broad enough to include a tenant at sufferance who is a *quasi-trespasser*. For though he has no right to emblements, that is, he cannot enter after he is out of possession to reap and remove crops which he sowed but did not reap, while in possession he may remove from the land and dispose crops on the land if he shall do so while in possession.<sup>45</sup> Disputes as to the ownership of crops growing on leased land may arise between tenants claiming under successive leases. As between a tenant who has planted a crop while in possession and one who claims under a lease for the same period though never in possession, the crop belongs to him who sowed and not to him who did not.<sup>46</sup> It is always competent for the parties to a lease to stipulate expressly that the title to the crops shall be in the lessor absolutely or until a certain condition is performed or fulfilled by the tenant. Where this is done a crop, as soon as it comes in being, is the property of the lessor. As it grows its possession by the lessee is the lessor's

<sup>43</sup> Strain v. Gardner, 61 Wis. 174, 21 N. W. Rep. 35; Rowlands v. Voechting, 115 Wis. 352, 355, 91 N. W. Rep. 990; in which the court says: "It must be admitted, however, that the general rule supported by the great weight of the authority is that where the relation of landlord and tenant exists, even though the rent is to be paid in kind, the title to the crops is in the tenant until division is made unless specific provision has been made by the parties, in their contract, to the contrary. \* \* \* Is there any provision of the lease before us which changes the general rule. We think not. In the first place no part of the produce is to be paid to the landlord *in specie*."

" Gibbons v. Dillingham, 10 Ark. 9, 50 Am. Dec. 233; Flournoy v. Wardlaw, 67 Ga. 378; Freeman v. Underwood, 66 Me. 229; Chicago etc. Co. v. Linard, 94 Ind. 319. Even a mere trespasser is entitled as against the owner of the land to the crops which he sows while in possession. Wolcott v. Hamilton, 61 Vt. 79, 17 Atl. Rep. 39, 42.

" Wolcott v. Hamilton, 61 Vt. 79, 17 Atl. Rep. 39, 42.

" McKean v. Smoyer, 37 Neb. 694, 56 N. W. Rep. 492, holding also that a judgment of restitution in an action of detainer by the second lessee is not material where the crop matured during the pendency of the action. Meffert v. Dyer, (Mo. 1904) 81 S. W. Rep. 643.

possession. If the ownership of the crop is to remain in the landlord until the tenant does some act, the possession of the tenant is in his own right only when that act is performed.<sup>47</sup> Prior to that time the title to the crops is in the lessor who may sell to a purchaser, or mortgage or incumber his interest, or it may be taken in execution for his debts. The reservation of the crops to the lessor must be in express language. Thus, where the lease stipulated that the tenant was to raise enough fodder to feed stock owned jointly by the landlord and tenant, besides which a money rental was paid, the property in fodder raised is not in the landlord nor can he maintain replevin for it against the tenant. The agreement to feed the fodder to the stock is an executory contract for the breach of which the landlord may recover damages.<sup>48</sup> The tenant may recover for damages to his crops from a railroad which, prior to the lease, has located on the land, though no notice has been given of the time when the railroad will take possession. The possession of the owner continues until the railroad takes possession, and while the owner's possession thus continues he may lease it, subject to the lease being terminated by the action of the railroad company. He need not leave it remain idle, for it may be months or years after the location of the line before the company enters on the land for the purposes of construction or to take necessary steps for the assessment of damages. In the meantime, if by leasing it, he permits another to improve it and receives compensation for the other's use, it is manifest that this other and not the owner should be compensated for any damages which may result to him.<sup>49</sup>

<sup>47</sup> *Farnum v. Hefner*, (Cal.) 16 Pac. Rep. 324; *Andrew v. Newcomb*, 32 N. Y. 417; *McCombs v. Becker*, 5 Thomp. & C. 550, 3 Hun, 342; *Fox v. McKinney*, 9 Oreg. 493.

<sup>48</sup> *Colville v. Miles*, 127 N. Y. 159, 162, 27 N. E. Rep. 809, 12 L. R. A. 848, 24 Am. St. Rep. 433, reversing 45 Hun (N. Y.) 236, citing *Johnson v. Crofoot*, 53 Barb. (N. Y.) 574, 37 How. Pr. 59; *McCombs v. Becker*, 3 Hun (N. Y.) 342, 5 Thompson & C. 550, and compare *Hawkins v. Giles*, 45 Hun (N. Y.) 318.

<sup>49</sup> *Lafferty v. Schuylkill River East Side R. Co.*, 16 Atl. Rep. 869, 124 Pa. St. 297, W. N. C. 334. The tenant of farm land may recover damages to a growing crop of grass for injury caused thereby by fire caused by a spark from a locomotive. *Gulf, C. & S. F. Ry. Co. v. Smith*, 3 Tex. Civ. App. 483, 23 S. W. Rep. 89. See, also, *Gulf, C. & S. F. Ry. Co. v. Dusenberry*, 86 Tex. 525, 26 S. W. Rep. 43 as to the tenant releasing such claims to the landlord. "Being a lease, there can be no doubt, we think, that the crop of wheat grow-

**§ 774. Title to crops after severance during the term.** Though crops, when they are severed from the soil by the tenant during the term, at once become personal property, the tenant is not compelled to remove them from the land during the term. The rule which is sometimes applicable to fixtures attached to the premises by the tenant does not apply to grain or other similar crops. Hence, a subsequent tenant who enters on the land, knowing that the former tenant is the owner of corn or other crops which he finds harvested upon the premises, acquires no title thereto by reason of the fact that their owner has not removed them during the term, and where the new tenant removes the corn from the premises, as he has a right to do, and stores it elsewhere, the former tenant may maintain an action of replevin against any person in whose possession he finds it.<sup>50</sup>

**§ 775. A covenant by the tenant not to remove crops.** The removal and sale by the tenant, or by any other person with his consent or at his direction, of the produce of the land which the tenant has covenanted not to remove, will render the tenant liable to the landlord for damages sustained by the latter.<sup>51</sup> The landlord may sue the tenant in trover or for the conversion of

ing upon the leased premises when the instrument was executed, and which matured during the term of the lease became the property of the lessee, the same not having been reserved by the lessor. This must necessarily result from the rules of law that the tenant is vested with all the rights incident to possession and the use and enjoyment of all the privileges appurtenant to the leased premises and may maintain an action against any person who disturbs his possession or trespasses upon the premises, even though it be the landlord. The latter has no right to enter during the term, to repair or to remove crops unless he has stipulated with the lessee for such right. Had the question related to the crop of grass grow-

ing upon the premises when the lease was executed no one could contend that it did not pass by the lease to the lessee, who might lawfully pasture his cattle upon it. The fact that the crop is wheat instead of grass cannot change the rule. *Emery v. Fugina*, 68 Wis. 505, 508.

<sup>50</sup> *Meffert v. Dyer*, 107 Mo. App. 462, 465, 81 S. W. Rep. 643. The outgoing tenant has a reasonable time to remove his crop whether it has been severed or not. His failure to remove his crop in a reasonable time does not confer a title to the crop upon the landlord or a new tenant but entitles them to reap it and store it at his expense. *Hecht v. Dettman*, 56 Iowa 679.

<sup>51</sup> *Fox v. McKinney*, 9 Oreg. 493.

the crop and he may replevin it where he finds it in the possession of a third party. But a breach of the covenant not to remove crops does not usually operate to work a forfeiture of the lease in the absence of an express provision to that effect.<sup>52</sup> A tenant's covenant not to voluntarily remove or sell crops is broken only by a removal by him or by some person with his consent. The sale or removal of a crop or of the produce of the farm under the levy of an execution shown upon a judgment against the tenant being without his consent is not a breach of the covenant by him not to remove or sell the produce of the land.<sup>53</sup> The sale under the execution, the judgment being in *in-vitum*, is no breach of such a covenant, though if the execution were levied under a judgment confessed, and it was confessed for the purpose of evading the operation of the covenant, it might be a breach. The removal following a sale under the execution is involuntary. The cases construing covenants not to assign or set over the lease are applicable under these circumstances.<sup>54</sup>

**§ 776. The rights of a sub-tenant to emblements.** A sub-tenant's right to emblements depends to a certain extent upon the duration and character of the lease which is held by his lessor and on the way in which that lease may be terminated. If the sublessee knows that his lessor's term is certain to come to an end before a crop which he plants shall mature, he sows the crop at his own risk and cannot claim emblements where his own term is ended by the expiration of the term of his lessor. So, also, a tenant of a tenant for life may, after the death of his lessor, gather crops sown by him during the life of the life tenant. The fact that he knew that his landlord was only a life tenant, or even the fact that the sub-tenant knew his landlord would die before the crops were mature, or that he, the sub-tenant, had not cultivated the land in a husbandlike manner, does not affect his right to gather what he has sown.<sup>55</sup> Where a tenant for life makes a lease for years and dies before the expiration of the term, the under-tenant or tenant for years may reap any crop which he has sown during the term and is entitled to enter for that pur-

<sup>52</sup> Phillips v. Tucker, 3 Ind. 132. 353; Smith v. Putnam, 3 Pick.

<sup>53</sup> Smith v. Putnam, 3 Pick. (Mass.) 224.  
(Mass.) 221, 222. <sup>55</sup> Bradley v. Bailey, 36 Conn.

<sup>54</sup> Doe d Mitchinson v. Carter, 8 374. 15 Atl. Rep. 746.  
F. R. 57; Doe v. Bevan, 3 M. & S.

pose as against the remainderman.<sup>56</sup> In some cases, however, a sub-tenant is in a better position as to emblements than his lessor. So, if a tenant having underlet abandons the premises, he has no emblements though his sub-tenant may have. Thus, where a tenant for years, whose lease depends on a condition, loses his term by a breach of condition and the lessor enters thereon, because of which the under-tenant is ousted, he may take emblements.<sup>57</sup> But a person who, with a full knowledge of the facts, leases land from a lessee while an action in ejectment brought by the original lessor against the original lessee is pending, and plants a crop, cannot claim emblements in his character of an under-lessee in good faith when, by a judgment in ejectment, he is ousted. He becomes by the judgment a trespasser *ab initio*. Being well aware of his risk and having chosen to assume it he cannot complain of the consequences which his folly invited.<sup>58</sup>

**§ 777. The right of a purchaser of a growing crop.** As a result of the rule of the common law by which a tenant holding for an uncertain term is entitled to his crops, it follows that such a crop is between him and his landlord his personal property.

<sup>56</sup> Co. Litt. 50, 2 Black Com. 145; Bevans v. Briscoe, 4 H. & J. (Md.) 139, 140.

<sup>57</sup> Oland v. Burdwick, Cro. Eliz. 46; Bevans v. Briscoe, 4 Har. & J. 149; Samson v. Rose, 65 N. Y. 411, 418; Winkler v. Gibson, 2 Kan. App. 621, 42 Pac. Rep. 937. The condition having been broken after the underlease was made, it was reasonable in these cases that emblements should be allowed, as the underlessee had no reason when he took the premises to anticipate the special mode by which the lease was terminated, and to which his own act in no wise contributed."

<sup>58</sup> Samson v. Rose, 65 N. Y. 411, 418. The right of a lessee of a life-tenant to gather crops sown by him during his term where it was suddenly terminated by the death of the life tenant is not

affected by the condition of the latter's health when the crop was sown, or by the lessee's belief or knowledge, if such knowledge was possible that the death of the life tenant was imminent and that his life would not continue until harvest time nor is the right of the lessee to away-going crops affected by the mode of his sowing them or by the fact that he has not cultivated the land according to the rules of good husbandry. Nor can it be shown that the lessee sowed the land in an imperfect and hurried manner because he expected his lease would terminate in a few days on account of the death of his lessor a life tenant as his belief or knowledge on this point is absolutely immaterial. Bradley v. Bailey, 56 Conn. 374, 15 Atl. Rep. 746, 7 Am. St. Rep. 316, 1 L. R. A. 427.

The tenant, instead of reaping the crops himself, may sell it to a third party during the term or he may sell it to a third person after the term is determined. It is then the duty of the purchaser of the crop immediately after the purchase to notify the landlord of his purchase and of his title to the crops. He will thereafter have all the right to and title in the growing crops which the tenant, who is his vendor, possessed before the sale. The vendee acquires the right to ingress and egress upon the demised premises for a reasonable time after the expiration of the term for the purpose of harvesting and removing the crops. His title to the crops and his rights under such title cannot be defeated by a subsequent agreement between the landlord and the tenant cancelling the lease and surrendering the possession of the premises to the landlord to which he was not a party.<sup>59</sup> Hence, where a tenant while in the possession of the premises under a lease which gives him the right to harvest a crop as well as to sow one, sells the growing crop before any default on the lease on his part, his purchaser takes a valid title to the crop which cannot be subsequently defeated by the subsequent default or abandonment of the premises by the lessee. But in all these cases it is advisable and perhaps necessary that the landlord should have been notified by the vendee of the crop that he has acquired a title to it.<sup>60</sup>

**§ 778. Title to crops. As against mortgagee and purchaser at a foreclosure sale.** In considering the question of the title of a tenant to crops as against a mortgagee of his landlord or as against the purchaser at a sale in foreclosure, the first question to be determined is whether the crops have been severed from the land. The produce of the soil by the act of severance becomes at once personal property and there can be no doubt that severed crops on the land at the time a deed is given under a foreclosure sale do not pass to the grantee,<sup>61</sup> though

<sup>59</sup> Shaw v. Bowman, 91 Pa. St. 414; Nye v. Patterson, 35 Mich. 413.

<sup>60</sup> Carney v. Mosher, 97 Mich. 554, 556, 56 N. W. Rep. 935; Nye v. Patterson, 35 Mich. 413; Miller v. Havens, 51 Mich. 482; see also, Dayton v. Vandoozer, 39 Mich. 749; in which case it was expressly held that the tenant's

right to sell growing crops on abandoning the land during the term was not lost by a failure on his part to perform the conditions of the lease unless the lease contained an express clause of forfeiture for the non-performance of the conditions.

<sup>61</sup> Johnson v. Camp, 51 Ill. 219, 222.

planted and harvested by a tenant under a lease made while the foreclosure suit was pending. The disposition of crops actually growing upon the land and thus part of the soil as between the tenant who planted and a purchaser at foreclosure must be determined upon a different basis. If it be assumed according to the ancient common law theory of a mortgage that its execution and delivery create an estate in the land, it may be that crops growing at the delivery of the sheriff's deed, planted by a tenant after the mortgage was made, would go to the grantee or purchaser at foreclosure.<sup>62</sup> Where, however, the modern theory of mortgages is recognized, according to which they confer no estate in the land but merely a lien upon it, which ripens into an estate in the mortgagee or some other person only upon a sale in foreclosure, a different rule would apply to crops of a tenant growing on land mortgaged. Hence, it has been held that as against a purchaser at foreclosure, a tenant of the mortgagor is entitled to the crops grown by him, which are matured when the deed is executed, though not severed from the land.<sup>63</sup> The

<sup>62</sup> *Jones v. Thomas*, 8 Blackf. (Ind.) 428; *Rankin v. Kinsey*, 7 Brad. (Ill.) 215; *Anderson v. Straub*, 98 Ill. 485; *Yates v. Smith*, 11 Ill. App. 459.

<sup>63</sup> *Hecht v. Dettman*, 56 Iowa 679, 41 Am. Rep. 131, 7 N. W. Rep. 495, 10 N. W. Rep. 241; *Everingham v. Braden*, 58 Iowa 133, 12 N. W. Rep. 142; *Richards v. Knight*, 78 Iowa 69, 42 N. W. Rep. 584, 4 L. R. A. 453; *Heavilon v. Bank*, 81 Ind. 249, 253; *Gray v. Warst*, 129 Mo. 122, 136, 31 S. W. Rep. 585; *Sandel v. Douglass*, 27 La. Ann. 629; *contra*, *Reed v. Swan*, 133 Mo. 100, 34 S. W. Rep. 483. In *Heavilon v. Bank*, 81 Ind. 249 the court by Woods, J. says on p. 253, "When such foreclosure and sale can and will be accomplished in any case, can not be anticipated, and so the term of tenancy being uncertain, the case comes under the general rule already stated; besides the statute

of redemption now prolongs the right of possession of the land owner or occupant beyond the time of sale, whether upon execution or decree, for the period of one year. When that year will terminate, can not be known of course, until the sale has been made, or, at least advertised. After a sale has been made, or perhaps advertised, it would seem that, as against the purchaser, the tenant who would sow must do so at his peril." See, also, *Johnson v. Camp*, 51 Ill. 220; *McLean v. Bovee*, 24 Wis. 295. In *Howell v. Schenck*, 24 N. J. L. 89 it was held that a purchaser at foreclosure under a mortgage given prior to a lease was entitled to a tenant's crops growing at the time of sale. But the court bases its decision on Lord Mansfield's dictum in *Keech v. Hall, Doug.* (Eng.) 21, 22 and proceeds upon the theory that by a sale under foreclosure

agreement of a purchaser on foreclosure with the tenant that the latter may remain as his tenant may operate to vest in the latter a title to crops which otherwise might be claimed by the purchaser. Thus where a tenant of a mortgagor, who had been made a party to the foreclosure proceedings, planted a crop after a decree had been rendered and the land was sold before the crop matured, but the purchaser told the tenant, who had planted the crop, he could stay on the land if he would pay rent to him, it was held that as between the purchaser and the tenant the former could not claim the crop but that the tenant who had sown the crop was entitled to gather it.<sup>64</sup>

**§ 779. The knowledge by a tenant of an action to foreclose his landlord's title.** As between an owner of land and a trespasser who has planted a crop thereon, the crop is real property, though in fact the trespasser has severed it. The owner of the land has the title to the crop and may maintain an action of trover for its removal by the trespasser.<sup>65</sup> Hence, if in any particular case upon all the circumstances in proof it shall turn out that a person who thought he was a tenant, sowed a crop when he was in fact a trespasser, so far as the land owner was concerned, he cannot claim emblements. Thus, for example, where, pending an action of ejectment against the owner, a person who, with actual or constructive record notice of the pendency of the litigation, enters upon the premises as a tenant from one of the defendants in an action of ejectment and plants a crop, he cannot claim a right to remove the same after the judgment determining that the party under whom he claims possession was not the true owner. Having taken the land after the suit in ejectment has been begun, he takes it subject to the outcome of that action. If, by reason of the judgment in the action, it

the lessee is evicted by a paramount title claiming that a distinction exists as to the right to emblements between a case where the term is ended by the act of God and a case where it is ended by the assertion of a paramount title. See, also, *Lane v. King*, 8 Wend. (N. Y.) 584, 24 Am. Dec. 105.

<sup>64</sup> *Munday v. O'Neill*, 44 Neb. 724, 726, 63 N. W. Rep. 32, 48 Am.

St. Rep. 760. Citing *Yeazel v. White*, 40 Neb. 432; *Foss v. Marr*, 40 Neb. 559; *Hecht v. Dettman*, 56 Iowa 679; *Downward v. Groff*, 40 Iowa 597; *Cassilly v. Rhodes*, 12 Ohio St. 88; *Houts v. Showalter*, 10 Ohio St. 125 in which the right of a mortgagor to the crops is considered.

<sup>65</sup> *Simpkins v. Rogers*, 15 Ill. 397; *Sallade v. James*, 6 Barr Pa. 144; *Cratty v. Collins*, 13 Ill. 567.

turns out that his lease was invalid and himself a trespasser, he must suffer the consequences. The judgment is retroactive and its effect is to render the possession of the tenant unlawful from the minute of his entry and make him a trespasser from that date and it is no defense for him to allege and prove that the crops were to be severed before the judgment.<sup>66</sup> So, where the lessor brings ejectment against his lessee on the forfeiture of the lease, and while the action is pending, the defendant sublets to another who, with a full knowledge of the facts, plants a crop which is severed but not removed before the date the original lessor is put in possession under the judgment, the crops thus planted belongs to the plaintiff in ejectment.<sup>67</sup>

**§ 780. Title to crops as against judgment creditors.** By reason of the fact that the crops growing on the demised land during the term are the property of the tenant in the absence of an express agreement that they shall belong to the landlord, they are subject to be sold under an execution on a judgment against the lessee. It is not material whether they are growing or whether they have been severed from the land. On the other hand, the sale of the premises under a judgment or a decree of court in an action against the lessor does not confer any title to, or right in, crops which are growing at the date of the levy to the purchaser at the execution sale.<sup>68</sup> For the sheriff on a sale

<sup>66</sup> Tittle v. Kennedy, 71 S. Car. 1, 50 S. E. Rep. 541; McGinnis v. Fernandes, 32 Ill. App. 424, 425; Yates v. Smith, 11 Ill. App. 459, 460; Rowell v. Klein, 44 Ind. 290, 294, 15 Am. Rec. 235; Powell v. Rich., 41 Ill. 466.

<sup>67</sup> Samson v. Rose, 65 N. Y. 411. In the case last cited the court by Buskirk, J. said: "The real question, therefore, presented for our decision is, whether a tenant who rents of and enters under one in adverse possession of land, against whom is pending a suit to recover the possession of such land, of which suit the tenant has actual notice, can, after the recovery of the land against his landlord, and after the landlord has surrendered the possession of

the land in pursuance of the recovery so had, enter and take away the crops sowed by him during the pendency of the suit. The law is well settled that by her (the landlord's) recovery she was entitled to not only to the soil, but to the wheat then growing upon and constituting a part of it. Every claim that may have been urged by Hooke (the party in adverse possession) to the land or anything growing upon it, at the time of the judgment, was merged in the judgment and though the appellee (the tenant) was not a party to this judgment, he was just as conclusively bound by it as was his landlord."

<sup>68</sup> Lewis v. Klotz, 39 La. Ann. 259, 1 So. Rep. 539.

made by virtue of the levy of an execution issued on a judgment against the lessor can sell only such interest in the land as is actually owned by him. Hence, the sheriff's deed of the land conveys no interest in growing crops which are on the land at the date of the deed to the purchaser at the execution sale.<sup>69</sup> The fact that the judgment under which the sale was made was a lien on the demised land at the date of the execution of the lease is not material. The judgment is not a lien on any property not owned by the judgment debtor and in as much as during the term the title to the crops continues in the tenant the judgment lien does not attach to them.<sup>70</sup> So, also, in a case where, by statute, a tenant in the possession of land which is sold under execution and who is in possession at the date of the acknowledgment of the sheriff's deed is declared to thereby become a tenant at will of the purchaser he will be entitled, upon well recognized principles of law, to remove as his emblements a growing crop which is in the ground when he is notified by the purchaser at the execution sale that he intends to terminate the tenancy. Thus, if after the delivery of the deed the tenant should under the statute by holding over become a tenant at will of the purchaser, he will, if he plants a crop, on the termination of his tenancy, be entitled to remove it. If, however, the tenant becomes by an agreement with the purchaser, a tenant for years and then plants a crop he cannot at the common law remove said crop, though in some cases he may do so by custom.<sup>71</sup> The rule that the tenant's crops are liable to be sold under an execution against him is subject to any special agreement he may have made with his landlord regarding the disposition of the same. Thus, where, by the express terms of the lease of a farm it is stipulated that all the hay and straw raised on the farm shall be used thereon all the hay raised by the lessee must be so used and cannot be taken under execution by his creditors.<sup>72</sup> The fact that the lease is made and the crops are planted by the tenant after the judgment has

<sup>69</sup> Bittinger v. Baker, 29 Pa. St. 66, 69, 70 Am. Dec. 154; McKelby v. Webster, 170 Pa. St. 624, 32 Atl. Rep. 1096; overruling Sallade v. James, 6 Pa. St. 144, 145, and Groff v. Levan, 16 Pa. St. (4 Harris) 179. See also sustaining text, Albin v. Riegel, 40 Ohio St. 339.

<sup>70</sup> McKelby v. Webster, 170 Pa. St. 624, 32 Atl. Rep. 1096.

<sup>71</sup> Bittinger v. Baker, 29 Pa. St. 66, 70, 70 Am. Dec. 154.

<sup>72</sup> Coe v. Wilson, 46 Me. 314; Potter v. Cunningham, 44 Me. 192.

been rendered against his landlord does not give the purchaser on the execution sale any title to the crops then growing. The sheriff can sell only the landlord's interest and the purchaser takes any possible lien on or interest in the crops which the landlord might have had. The purchaser has, however, no legal title to the crops and for that reason cannot maintain an action of trover against the tenant or any other person.<sup>73</sup>

**§ 781. The tenant's title to an increase of live stock on the premises.** The natural increase of cattle, sheep and other live stock which occurs on a farm during a term for which it is leased with the use and possession of the live stock upon it belongs to the lessee of the farm in the absence of an agreement in the lease to the contrary.<sup>74</sup> It is, however, always advisable where a farm is leased with live stock upon it which are to be used by the tenant during the term, that the title to the increase of such live stock shall be provided for in the lease. The tenant is responsible to his landlord for his negligence and lack of skill in caring for the live stock leased to him with the farm, but in the absence of an express agreement by him to return the live stock which is leased with the farm, the tenant is not responsible to the landlord for the death or loss of such live stock unless it shall affirmatively appear that the death or loss was caused by the tenant's negligence.<sup>75</sup> The lease of live stock does not give to the tenant the right to sell them. All he has under such lease is the right to use such live stock for the purpose of cultivating the farm. Horses on the farm may be used for plowing or planting but cannot be hired out to other persons. Without doubt the

<sup>73</sup> *Dollar v. Roddenberry*, 97 Ga. 148, 25 S. E. Rep. 410. For cases holding that a tenant's crops growing on leased land may be sold on an execution against the tenant, see *Whipple v. Foot*, 2 Johns. (N. Y.) 418, 3 Am. Dec. 442; *Smith v. Tritt*, 1 Dev. & B. (N. Car.) 241, 28 Am. Dec. 565; *Heard v. Fairbanks*, 5 Met. (Mass.) 111, 31 Am. Dec. 394; *Backenstoss v. Stahler's Admr.*, 23 Pa. St. 251, 75 A. M. Dec. 592; *Willis v. Moore*, 59 Tex. 628, 46 Am. Dec. 284; *Polley v. Johnson*, 52 Kan.

478, 35 Pac. Rep. 8, 23 L. R. A. 258; *Mabry v. Harp*, 53 Kan. 598, 56 Pac. Rep. 743; *Erickson v. Peterson*, 47 Minn. 525, 50 N. W. Rep. 699.

<sup>74</sup> *Moore v. Mahney*, 1 Mich. N. P. 143; *Woods v. Charlton*, 62 N. H. 649; see contra where lease was, *Foster v. Gorton* 5 Pick, (Mass.) 185; *Chamberlain v. Shaw*, 18 Pick (Mass.) 278, 29 Am. Dec. 586, 589.

<sup>75</sup> *Conklin v. Carpenter*, 12 N. Y. St. Rep. 632.

tenant of a farm upon which milch cows were at the time of the lease would be entitled to sell the milk as a product of the farm. So, too, the tenant would be entitled to the wool which he might shear from a flock of sheep leased to him with the farm. And where a tenant who has expressly covenanted "to faithfully return stock in quantity and quality to the lessor or the value in money as the lessor may elect" sells the stock and substitutes others in their place the latter belong to the lessor at the expiration of the term<sup>76</sup> or he may sue the purchaser in conversion. In the absence of an agreement to the contrary the owner of stock which is leased to a tenant continues to be the owner of them and of all the products and profits thereof, subject to the right of the tenant to use them and to take their profits during the term. Thus, the lease of a farm with a flock of sheep for a year, with the reservation to the landlord who owns the sheep of a specified quantity of the wool; and providing also that the sheep are to be counted and delivered back to the lessor sometime after the term is at an end by reason of which the lessee's responsibility for them terminates, gives the lessee no profit in the sheep but only an implied right after the term has ended to enter on the premises and to shear the sheep at a suitable time. Under such an agreement the lessee does not become the owner of any of the wool until the lessor's share is set out separately. The possession of the sheep is only to be in the lessee during the term. The stipulation that the lessor was to have a certain proportion of the wool, carries with it by implication the construction that the lessee, who had cared for the sheep during the term was to have the remainder, and where he has not sheared the sheep during the term he has by implication a right to enter on the premises and shear them after the term is at an end.<sup>77</sup>

**§ 782. The effect on emblements of the forfeiture of a lease by the breach of a condition.** A tenant who forfeits his term by a breach of the condition in the lease cannot, after the re-entry of the landlord claim emblements. He cannot, therefore, after an ejectment has been begun or re-entry has been made for a breach by the landlord enter upon the premises to gather crops either as emblements or by custom.<sup>78</sup> He will be

<sup>76</sup> Billings v. Tucker, 6 Gray Mass. 278, 281, 29 Am. Dec. 586, (Mass.) 368, or he may sue the purchaser in conversion. <sup>78</sup> Gregg v. Boyd, 69 Hun, 588, 23 N. Y. Supp. 918; Hunter v.

guilty of a trespass if he shall do this. But in all such cases in order that a breach of condition shall forfeit the right of the tenant to gather the crops there must be an express clause of forfeiture in the lease.<sup>79</sup> Where an action is begun in ejectment for the breach of a condition the judgment which is rendered relates back to the beginning of the action and the tenant who has broken the condition is a trespasser from that date. Accordingly it is not material that the crops have been severed by the tenant after the beginning of the action in ejectment and before the execution of the writ of possession. For the tenant cannot remove crops which are severed from the land after the date of the demise named in the declaration.<sup>80</sup> So he cannot remove crops which are severed after the actual re-entry by the lessor for the breach of a condition or after the service of a summons in an action of ejectment brought under the statute.<sup>81</sup>

**§ 783. The right of an outgoing tenant to the manure made on a farm.** It is a general rule in the absence of express agreement to the contrary that manure made on a farm is part of the land. An outgoing tenant of a farm is therefore not entitled to carry away either during his term, or at or after its expiration, manure made by his cattle on the land though lying in heaps in the farm yard and made by his own cattle fed with the tenant's fodder.<sup>82</sup> The doctrine was established for the bene-

Jones, 2 Brewst. (Pa.) 370; Debow v. Colfax, 10 N. J. Law, 128, 130.

<sup>79</sup> Dayton v. Vandoozer, 39 Mich. 749.

<sup>80</sup> Hodson v. Gascoigne, 5 Barn. & Ald. 88; Doe v. Witewick, 10 J. B. Moore, 267, 3 Bing. 11; Adams on Ejectment, 4th Ed. p. 416.

<sup>81</sup> Gregg v. Boyd, 23 N. Y. Supp. 918, 69 Hun, 588. A tenant whose lease is forfeited by his attempted assignment which was forbidden by the provision of a lease is not entitled to crops growing at the date of forfeiture. The crops then passed to the landlord with the land. Myer v. Roberts, (Or. 1907) 89 Pac. Rep. 1051.

<sup>82</sup> Haslem v. Lockwood, 37 Conn.

500; Bonnell v. Allen, 53 Ind. 130; Lassell v. Reed, 6 Me. 222; Gallagher v. Shipley, 24 Md. 418, 87 Am. Dec. 611; Daniels v. Pond, 21 Pick. (Mass.) 367, 32 Am. Dec. 269; Lewis v. Lyman, 22 Pick. (Mass.) 437; Sawyer v. Twiss, 26 N. H. 345, 349; Perkins v. Carr, 44 N. H. 118, 120; Hill v. De Rochement, 48 N. H. 87, 88; Middlebrook v. Carwin, 15 Wend. (N. Y.) 169; Lewis v. Jones, 17 Pa. St. 262, 55 Am. Dec. 550; Waln v. O'Connor, 1 Phila. 353, 5 Pa. L. J. 164; Pearson v. Friedensville Zinc Co. 1 Pa. Co. Ct. Rep. 660; Roberts v. Jones, 71 S. Car. 404, 51 S. E. Rep. 240; see also Fay v. Muzzy, 13 Gray (Mass.) 53, where the

fit of agriculture. It found its origin in the fact that it is essential to the successful cultivation of a farm that the manure produced from the droppings of cattle and swine fed upon the products of the farm and composed with earth and vegetable matter taken from the land should be used to supply the drain made upon the soil in the production of crops, which otherwise would become impoverished and barren and in the fact that the manure so produced is generally regarded by farmers in this country as a part of the realty, and has been so treated by landlords and tenants from time immemorial.<sup>83</sup> And the tenant having himself no authority to remove the manure cannot confer authority to do so on another person.<sup>84</sup> An action on the case is at common law the proper action to recover for the damages sustained by the landlord.<sup>85</sup> This rule however may be superseded by an express contract between the parties to the lease that the

question whether an administrator should be charged with manure found in the barn yard of his intestate was answered in the negative though an affirmative answer was given to the question whether he was charged with manure which was from a stable in a hotel owned by him. See *contra* to the rule of the text, Staples v. Emery, 7 Greene (Me.) 201; Southwick v. Ellison, 2 Ired. Law (N. C.) 326. Daniels v. Pond, 21 Pick. (Mass.) 367 has always been regarded as a leading American case on the ownership of manure as between landlord and tenant. Chief Justice Shaw in that case bases his decision that manure made in the ordinary course of husbandry, consisting of collections from a barn yard, or of compost formed by mixing these with the soil or other substance, is a part of the land upon custom, practice, usage and general understanding. It has been hinted that this decision being expressly based on usage has no application

and is of no value where usage is not proved to exist.

<sup>83</sup> By the court in Haslem v. Lockwood, 37 Conn. 500, 505.

<sup>84</sup> Middlebrook v. Corwin, 15 Wend. (N. Y.) 169.

<sup>85</sup> 1 Chitty's Pl. 142. As between the successive grantees of the lessor and the lessee where the land is partitioned and conveyed in separate parcels, the manure belongs and is attached to the particular parcel of land on which it is located at the time of the sale. Thus where pending a lease and the actual occupation of a farm by the lessee, the land was partitioned and sold in separate parcels to various persons, but subject to the rights of the tenant and after the sale to A., manure accumulated in a barn located on the parcel purchased by him it was held that the manure belonged to A. and that the tenant would be restrained from removing it to another parcel of land sold to another person. Elting v. Palen, 60 Hun, 306, 14 N. Y. Supp. 607.

tenant is to own the manure made on the farm or by a custom existing and recognized locally to the same effect. It has also been held in one case that the general rule as to the ownership of manure made on the land does not apply where the lease is silent as to the purposes for which the demised premises are to be used.<sup>86</sup> It is also necessary to remember the very important qualification of the general rule that confines its operation strictly to manure made by cattle so far as they are fed fodder grown on the farm. For it is with reason and equity assumed that manure dropped upon agricultural land remains a part of such land only where it is the product of the consumption of fodder actually grown or raised upon the land.<sup>87</sup> Hence where the owner of a farm sells the land and leases the barns and granaries of his purchaser and at the date when the farm is sold there is a quantity of fodder in the barns belonging to the grantor, which, it is admitted, does not pass to the grantee and which the former owner and present lessee feeds to his cattle after the sale, the manure made by the cattle on the leased premises from such fodder belongs to the owner of the cattle.<sup>88</sup> So, also, a tenant at will occupying a barn only and feeding his cattle kept by him in the barn with his own hay brought by him from his own farm at a distance owns the manure which results from the feeding as against his landlord.<sup>89</sup> An agreement by the parties to the lease to treat manure as personal property of the tenant need not be contained in the lease, nor need it be in writing as it clearly does not come within the Statute of Frauds nor is it to be rejected because contemporaneous with the lease. An oral contract for the sale of the manure by the landlord to the tenant is valid.<sup>90</sup>

<sup>86</sup> *Gallagher v. Shipley*, 24 Md. 418, 87 Am. Dec. 611.

<sup>87</sup> *Taylor v. Newcomb*, 123 Mich. 637, 82 N. W. Rep. 519.

<sup>88</sup> *Taylor v. Newcomb*, 123 Mich. 637, 82 N. W. Rep. 519.

<sup>89</sup> *Corey v. Bishop*, 48 N. H. 146, 148, see, also, *Hill v. De Rochemont*, 48 N. H. 87; *Needham v. Allison*, 24 N. H. 355. A tenant of a farm may remove therefrom manure made thereon, from fodder grown elsewhere and bought by him, all the hay and fodder

grown on the farm having also been used thereon. *Pickering v. Moore*, 67 N. H. 533, 31 L. R. A. 698, 32 A. Rep. 828.

<sup>90</sup> *Strong v. Doyle*, 110 Mass. 92. "A tenant for years may remove the manure accumulated during the term, provided he does so before the term expires, and takes care not to scrape too deep so as to take any part of the virgin soil but after the expiration of the term the manure belongs to the owner of the land." *Smithwick*

**§ 783. The right to manure which was made on non-agricultural land.** The rule which vests the ownership of manure in the owner of the land on which it is made as against a tenant whose cattle make the manure is confined strictly to tenancies of farming lands. The manure is regarded as attached to the land only when made in the ordinary course of husbandry or in the cultivation of the land and is considered, in theory at least, as an equivalent to be returned or rendered by the tenant in lieu of and as compensation for the chemical and other material elements which have been abstracted from the ground by the tenant's cultivation and transformed into fodder which becomes in its turn and, on severance from the realty, the personal property of the tenant and which in turn is fed to his cattle. Hence manure made in a livery stable<sup>91</sup> or made in the business of raising and feeding hogs upon the products of other land<sup>92</sup> is no part of the soil on which it is made and consequently becomes and continues the property of the tenant and may be sold or removed by him at any time.<sup>93</sup>

**§ 784. The tenant's covenant as to the disposal of the manure.** A covenant by a tenant that he will not sell, give away or remove any manure made on his farm includes all manure made there whether by his cattle or by that of others. If there is no stipulation by whose provender the manure shall be produced then the landlord is entitled to it under the covenant though it was made by animals owned and fed by other persons but taken in agistment by the tenant. Hence manure made on a farm means manure produced on a farm that is being dropped there by any person's cattle though such cattle be fed on grain from another farm.<sup>94</sup> Under a covenant by a tenant to consume all hay on the premises or to place manure for every ton sold the bringing on of the manure by the tenant is not a condition precedent as regards the landlord to the carrying away of the hay. But a succeeding tenant has a right to refuse to permit the removal of hay from the premises which the preceding tenant had

v. Ellison, 2 Ired. (N. Car.) 326; quoted in Sanders v. Ellington, 77 N. Car. 255, 257.

<sup>91</sup> Daniels v. Pond, 21 Pick. (Mass.) 367, 32 Am. Dec. 269.

<sup>92</sup> Snow v. Perkins, 60 N. H. 493, 49 Am. Dec. 333.

<sup>93</sup> See, also, Corey v. Bishop, 48 N. H. 146; Plummer v. Plummer, 30 N. H. 558; Needham v. Allison, 24 N. H. 355.

<sup>94</sup> Hindle v. Pollitt, 6 M. & W. 529, 9 L. I. Ex. 288

sold without mentioning to the vendee his (the tenant's) liability to replace the hay with manure until after the manure is put on and that as the vendor of the hay had not enabled the purchaser to remove the hay in the first instance he was not entitled to recover the price.<sup>95</sup> A covenant in a lease of a farm that a tenant will consume and convert in manure all crops of a certain character raised during the term and if he should sell any part of said crops which he is at liberty to do then he should for every ton of such crop sold bring back and place upon the land a ton of good manure within three months after selling such crop is an alternative covenant so that the landlord in pleading a breach must allege and prove not only that the tenant carried away and sold the crop but also the negative averment that the tenant did not bring the manure back in the period stipulated in the lease.<sup>96</sup> An express stipulation in a lease regulating the disposition of the manure made upon the land excludes evidence of the custom of the country in regards to the disposition of the manure. Thus an agreement to the effect that a tenant shall not be paid for manure left by him on the farm at the expiration of the term excludes the operation of a custom that the tenant shall be paid for manure.<sup>97</sup> Where farm land is leased upon an agreement that manure made thereon shall be used upon the demised land, the lessor may not only maintain an action *ex contractu* for a breach of this covenant or agreement but he may also sue in tort for the conversion of the manure made upon the farm. The action for the conversion does not exclude the action on the covenant.<sup>98</sup>

**§ 785. Trees growing upon the soil during the tenancy.** Speaking generally a tenant has no title to or interest in the trees growing upon the soil during the term of the tenancy except so far as he may gather their fruit and enjoy the shade which their branches afford. His possession of the land entitles him to the possession of the trees only so long as they remain a part of the land upon which they grow. When they are severed from the land whether by him or by another they at once become personal property and the right to their possession is at once in the landlord because possession must be in him who has the title.

<sup>95</sup> Smith v. Chance, 2 B. & Ald. 753, 21 R. R. 485.

<sup>96</sup> Richards v. Bluck, 6 C. B. 437, 6 D. & L. 325, 12 Jur. 963.

<sup>97</sup> Roberts v. Barker, 1 C. & M. 808, 3 Tyr. 945, 2 L. J. Ex. 268.

<sup>98</sup> Brown v. Magorty, 156 Mass. 209, 30 N. E. Rep. 1021.

Hence the tenant cannot without the express permission of the landlord cut down timber and sell it and if he shall the landlord may maintain trover against him to recover the value of the timber converted.<sup>1</sup> It is not material that the trees were necessarily cut down by the tenant to render the land fit for cultivation.<sup>2</sup> The tenant acquires no title to the timber by cutting it from the land and as he has no title himself he cannot by selling it confer title on a *bona fide* purchaser for value.<sup>3</sup> Every tenant for years or for life, unless expressly forbidden by the leases is entitled to take reasonable estovers or botes from the land demised.<sup>4</sup> In language more modern and less technical a tenant for years or for life of agricultural lands may cut and use such growing timber as he may require for firewood and for repairing fences, houses, barns and other structures on the land unless restrained from so doing by the express language of the lease.<sup>5</sup> A tenant of farm land which is wild and uncultivated may cut down as much of the timber as is necessary to enable him to cultivate it though he cannot remove the timber or sell it to the prejudice of the landlord.<sup>6</sup> Nor can a tenant who has permission to cut timber from land he is clearing cut it and sell it from land he is not clearing.<sup>6</sup>

<sup>1</sup> Street v. Nelson, 80 Ala. 230; Brooks v. Rogers, 99 Ala. 433, 13 So. Rep. 386, 390; Anderson v. Hapler, 34 Ill. 436; London v. Warfield, 5 J. J. Marsh. (Ky.) 196; Mooers v. Wait, 3 Wend. (N. Y.) 104, 20 Am. Dec. 667; Van Deusen v. Young, 29 N. Y. 9; Mather v. Trinity Church, 3 S. & R. (Pa.) 509; Harlan v. Harlan, 15 Pa. St. 507, 513; Truss v. Old, 6 Rand. (Va.) 556.

<sup>2</sup> See, Slocum v. Seymour, 36 N. J. Law, 138. The rule of the text will not of course be applicable to trees and shrubs grown upon premises leased to and occupied by a nurseryman for his business and such would be held to be personal property of the tenant as against the landlord. See Fixtures.

<sup>3</sup> Mooers v. Wait, 3 Wend. (N.

Y.) 104, 20 Am. Dec. 667; Hill v. Burgess, 37 S. C. 604, 15 S. E. Rep. 963.

<sup>4</sup> 2 Black. Com. 122, 144. Anciently where the wood was for fuel it was called house-bote or fire bote; if for making or repairing implements of husbandry, plough-bote and cart-bote; if for fencing hay-bote or hedge-bote.

<sup>5</sup> Harris v. Goslin, 3 Har. (Del.) 340; Hinton v. Fox, 3 Litt. (Ky.) 380; London v. Warfield, 5 J. J. Marsh. (Ky.) 196; Walters v. Hutchin's Adm'x., 29 Ind. 136, 138; Van Deusen v. Young, 29 N. Y. 9; Hubbard v. Shaw, 12 Allen (Mass.) 120; Wright v. Roberts, 22 Wis. 161.

<sup>6</sup> Van Deusen v. Young, 29 N. Y. 9, 30, 4 Kent Comm. 76.

<sup>6</sup> Ladd v. Shattock, 90 Ala. 134, 7 So. Rep. 764.

**§ 786. The remedy of the landlord.** The landlord may maintain an action of trover against a tenant who has no right to emblements but who harvested the crop and carried it away after the expiration of his term and it is no defense for the tenant to show under such circumstances that he planted the crop during his tenancy with the impression that he was entitled to take it away.<sup>7</sup> Though an incoming tenant is entitled to crops which are on the land when he enters provided the outgoing tenant has no right to remove them, yet the incoming tenant cannot maintain trover against the outgoing tenant who removes them during the period he was holding over in possession of the land after the end of the term under a right conferred upon him by the lease. If the tenant who is outgoing has a right under his lease to hold the land after the term has expired for the purpose of harvesting and carrying away his crops his right so to do can not be tried in an action of trover, between him and the incoming tenant. The remedy of the latter is against the landlord for a failure to give him full possession.<sup>8</sup> The landlord is in nowise bound by an agreement between the outgoing tenant who is entitled to take away crops in relation to such crops made with the incoming tenant. The outgoing tenant may transfer his interest in the crops to the incoming tenant and, inasmuch as the crops are personal property, such a transfer would be in the nature of a contract of sale under which the vendor can recover for goods sold and delivered.<sup>9</sup> It has been held that a contract between an incoming tenant and an outgoing tenant for the sale of a crop growing on the land at the end of the term was not within the Statute of Frauds, inasmuch as it did not relate to an interest in the land.<sup>10</sup> But where the contract with an incoming tenant for the sale of growing crops forms a part of the contract for the making of the lease it is within the Statute of Frauds and must be in writing.<sup>11</sup>

**§ 787. The criminal element in the tenant removing a crop.** At the common law and in the absence of statute, the

<sup>7</sup> Griffith v. Tombs, 7 C. & P. 810. 1 Cr. & M. 89; Harvey v. Grabham, 6 Ad. & El. 61.

<sup>8</sup> Boraston v. Green, 16 East, 71.

<sup>9</sup> Leeds v. Burrows, 12 East, 1.

<sup>10</sup> Mayfield v. Wadsley, 3 B. & C. 357.

<sup>11</sup> Earl of Falmouth v. Thomas,

12 Arbuckle v. State, 32 Ind. 34 and Johnson v. State, 68 Ind. 43; State v. Scott, 68 Ind. 267, all of which construe the statute 2 Rev. St. Indiana, 1876, p. 481, § 76.

act of a tenant in cutting crops on the land which belong to the landlord is at the most a mere trespass and has no criminal character. If, after cutting the crop he removes it from the premises he is guilty of larceny for while he could not be guilty of larceny where the thing taken was real property yet the crop, by being severed from the land had become personal property and the taking it away is larceny. In some of the States the removal of a crop is a misdemeanor by statute. Thus in Indiana it is a misdemeanor for any person to go on the land of another and pull off, or pull off and carry away any portion of a growing crop.<sup>12</sup> And a statute substantially similar exists in the State of Louisiana.<sup>13</sup> In North Carolina it is a misdemeanor for a lessee of turpentine lands to remove any portion of the crops while there exists any lien thereon.<sup>14</sup>

<sup>12</sup> State v. Sheppard, 33 La. Ann. 1216.

<sup>14</sup> State v. Turner, 10 S. E. Rep. 1026, 106 N. Car. 691.

## CHAPTER XXXI.

### THE DESTRUCTION OF THE PREMISES DURING THE TERM.

- § 788. Effect of destruction of the premises by fire on tenant's liability to pay rent.
789. The destruction of the premises which are a floor or apartment.
790. The tenant's right to equitable relief.
791. The surrender of the premises by the tenant
792. The construction of express exceptions to the common law rule.
793. The effect of a covenant by the landlord to repair or build.
794. The destruction of the premises occurring before the entry by the tenant.
795. Deprivation of use of the premises by casualties of war.
796. General rules which are observed in construing the statute.
797. What constitutes unfitness for occupancy under the New York statute.
798. The accrual of the rents.
799. Negligence or fault of the tenant.
800. The destruction must be sudden and unexpected to bring the case under the statute.
801. Waiver of the statutes by the parties.

§ 788. Effect of destruction of the premises by fire, on the tenant's liability to pay rent. The relation of landlord and tenant is not determined by the destruction of the premises either where the lease is for a term of years in writing<sup>1</sup> or from year to year.<sup>2</sup> It is a well settled rule of the common law that where lands are the subject of a demise and the buildings or improvements thereon are accidentally destroyed before the end of the term, this destruction of the buildings by fire, tempest or flood does not discharge the covenant to pay rent in the absence of an express stipulation to that effect. The alleged reason for this rule so severe in its operation upon the tenant is that the subject of the lease is the land and not the buildings thereon and that the buildings are merely an incident to the land. As the land remained to the tenant after the erections

<sup>1</sup> Baker v. Holtpzaffel, 4 Taunt. 501, 2 Am. 39, 7 Scott, 537, 546, 63 45. Jur. 653.

<sup>2</sup> Izon v. Gorton, 5 Bing. (N. C.)

were destroyed and he still had the ability and opportunity to possess and enjoy it and an exclusive right to do so, his liability for rent was still assumed to continue.<sup>3</sup> The apparent injustice and inhumanity of this rule have been frequently adverted upon the courts. But though they have often stated that it would be

<sup>3</sup> Chamberlain v. Godfrey's Adm'r, 50 Ala. 530; Cook v. Anderson, 85 Ala. 99, 4 So. Rep. 713; Buerger v. Boyd, 25 Ark. 441, 443; Beach v. Farish, 4 Cal. 339; Cowell v. Lumley, 39 Cal. 151, 2 Am. Rep. 430; Lockwood v. Lockwood, 22 Conn. 425, 434; Peterson v. Edmonson, 5 Har. (Del.) 378; Ward v. Bull, 1 Fla. 271; Robinson v. L'Engle, 13 Fla. 482; Coy v. Downie, 14 Fla. 544; White v. Molyneux, 2 Ga. 124, 127; Gavan v. Norcross, 117 Ga. 356, 44 S. E. Rep. 771, 772; Stafford v. Staunton, 88 Ga. 298, 14 S. E. Rep. 479; Peck v. Ledwidge, 25 Ill. 109, 113; Barrett v. Boddie, 158 Ill. 479, 42 N. E. Rep. 143; Strautz v. Protzman, 84 Ill. App. 434; Moran v. Bergin, 111 Ill. App. 313, 315; Smith v. McLean, 123 Ill. 210, 218, 14 N. E. Rep. 50; affirming 22 Ill. App. 451; Womack v. McQuarry, 28 Ind. 103, 104, 92 Am. Dec. 306; Harris v. Heackman, 62 Iowa 411, 413, 17 N. W. Rep. 592; Proctor v. Keith, 12 B. Mon. (Ky.) 252, 254, 1 Bibb. (Ky.) 536; Fowler v. Bott, 6 Mass. 63; Lieberthal v. Montgomery, 129 Mich. 369, 80 N. W. Rep. 115; Schloss v. Schloss, 11 Det. Leg. N. 249, 100 N. W. Rep. 392, 393; Lampher v. Glenn, 37 Minn. 4, 33 N. W. Rep. 10; Fowler v. Payne, 49 Miss. 32, 78; Lincoln Trust Co. v. Nathan, 175 Mo. 32, 74 S. W. Rep. 32; Neidelet v. Wales, 16 Mo. 214; Gibson v. Perry, 29 Mo. 245; Davis' Admr. v. Smith, 15 Mo. 467; O'Neil v. Flanagan, 64 Mo. App. 87; Bowen v. Schackter, 72 N. J. Law, 441, 60 Atl. Rep. 1111; Patterson v. Ackerson, 1 Edw. Ch. (N. Y.) 96, 98; Gates v. Green, 4 Paige Ch. (N. Y.) 355, 358, 27 Am. Dec. 68; Willard v. Tillman, 19 Wend. (N. Y.) 358; Hallett v. Wylie, 3 Johns. (N. Y.) 44; Graves v. Berdan, 29 Barb. (N. Y.) 100, 26 N. Y. 498; Linn v. Ross, 10 Ohio 412, 415, 36 Am. Dec. 95; Bussman v. Ganster, 72 Pa. St. 285, 289; Hazlett v. Powell, 30 Pa. St. 293, 296; Pollard v. Schaefer, 1 Dall. (Pa.) 210; Magam v. Lambert, 3 Pa. St. 444; Fisher v. Milliken, 8 Pa. St. 121; Nashville C. & St. L. Ry. Co. v. Heikens, 112 Tenn. 378, 79 S. W. Rep. 1038; Deamond v. Harris, 33 Tex. 634; Richmond Ice Co. v. Crystal Ice Co., 37 S. E. Rep. 851, 99 Va. 239, 285; Arbenz v. Exley, 52 W. Va. 476, 44 S. E. Rep. 149, 61 L. R. A. 957; Waite v. O'Neil, 76 Fed. Rep. 408, 416; Lord Chesterfield v. Bolton, Com. Rep. 627; Izon v. Gorton, 35 Eng. Ch. 198; Baker v. Holtzapffel, 4 Taunt. 48, 18 Ves. 115; Walton v. Waterhouse, 3 Saund. 420; Bullock v. Domitt, 6 T. R. 650; Monk v. Cooper, 2 Ld. Raym. 147; Belfour v. Weston, 1 T. R. 310; Doe v. Sandham, 1 T. R. 705; Gregg v. Coates, 23 Beav. 33, 2 Jur. (N. S.) 964, 4 W. R. 735; Marshall v. Scofield, 47 Lt. 406, 31 W. R. 134; Selby v. Graves, L. R. 3 C. P. 594; Upton v. Townend, 17 C. B. 30, 47, 25 L. J. C. P. 44, 1 Jur. (N. S.) 1089, 4 W. R. 56.

more humane and conscientious to make a contrary rule they have thus far universally refused to do while seeking circumstances to take particular cases out of the rule. It has been pointed out that the rule is derived from a rude and semi-barbarous condition of affairs in feudal times in England when landlords had all possible advantages over tenants and that no such rule is recognized by the more enlightened policy of the Roman civil law or by those systems of jurisprudence which are derived from the civil law as for example the systems of law of Continental Europe. It is admitted a Herculean task to attempt to change it and one which will not be feasible except by statutory enactment. In many of the States of the Union the common law has been expressly abrogated by statutes and where this has not been done the courts enforce the common law grudgingly and console the unfortunate lessee who suffers by their application of it by the admonition that it is his ignorance or neglect which has brought him under its application inasmuch as he might have avoided its operation upon his term by having a clause inserted in his lease exempting him from the payment of rent in the case of the destruction of the premises.<sup>4</sup> The fact that during the existence of the lease, a building on the leased premises is destroyed by fire, will not terminate the liability of the lessee for rent, though the building is a wooden one and by the terms of an ordi-

<sup>4</sup>Lincoln Trust Co. v. Nathan, 175 Mo. 32, 43, 74 S. W. Rep. 1007. In Whitaker v. Hawley, 25 Kan. 674, 683, 37 Am. Rep. 277 the rule of the common law is severely criticised and an exhaustive list of reasons is given which might have prompted the court had the question been a new one to decide it very differently. Still the court did not have the courage to deny the application of the ancient rule of law. The reason of the rule, usually assigned, is, that the lessee by his own contract creates the charge upon himself, and, no fault being imputable to the landlord, he should be compelled to bear it, as he could if he had

chosen, have relieved himself by a stipulation for the cessation of rent in the event of such destruction. Considerations of public policy seem also to have entered into the adoption of the rule. Such destruction may result from the carelessness of the lessee, and it may not be possible for the lessor to offer evidence of it. Holding the tenant to liability for rent, removes temptation to negligence and keeps alive the diligence he should observe in protecting and preserving the premises." By Brickell, J. in Chamberlain v. Godfrey's Adm'r. 50 Ala. 530 on p. 533.

nance existing at the date of the lease, or afterward enacted, the re-building of the structure is forbidden.<sup>5</sup>

**§ 789. The destruction of the premises which are a floor or apartment.** Where, however, the principal subject of the demise is not land, but a room, floor or an apartment in a building and the building is destroyed this rule does not apply. Under such circumstances the lease is at an end, the interest of the tenant under it is destroyed and his liability to pay under a covenant to pay rent is extinguished. This exception to the general rule is based upon a presumption that the floor, room or apartment was the principal subject matter of the hiring and that therefore the interest of the tenant in the lease was to continue only as long as the subject matter of the lease existed.<sup>6</sup> The rule that the destruction of a building by fire, does not release the lessee from the claims of rent, does not apply to a lease of an apartment.<sup>7</sup> Where no estate in the land itself is leased to the tenant, and all that he acquires under the lease is the right to the possession and occupancy of rooms or apartments, and the structure containing the leased premises is destroyed, the lease

<sup>5</sup> *Harris v. Heackman*, 62 Iowa 411. *Taylor v. Caldwell*, 113 E. L. 465; *L.* 824.

<sup>6</sup> *Chamberlain v. Godfrey's Admr.*, 50 Ala. 530, 534; *McMillan v. Solomon*, 42 Ala. 356; *Buerger v. Boyd*, 25 Ark. 551; *Ainsworth v. Ritt*, 38 Cal. 89; *Gavan v. Norcross*, 117 Ga. 356, 43 S. E. Rep. 771; *Womack v. McQuarry*, 28 Ind. 103, 104, 92 Am. Dec. 306; *Humiston, Keeling & Co. v. Wheeler*, 175 Ill. 514, 51 N. E. Rep. 893, affirming 70 Ill. App. 349; *Whitaker v. Hawley*, 25 Kan. Cy. 4, 687; *Stockwell v. Hunter*, 11 Met. (Mass.) 448, 45 Am. Dec. 220; *Kerr v. Merchant's Exchange Co.*, 3 Edw. Ch. (N. Y.) 315; *Graves v. Berdan*, 26 N. Y. 298; affirming 29 Barb. (N. Y.) 100; *Austin v. Field*, 7 Abb. Pr. N. S. (N. Y.) 29; *Winton v. Cornish*, 5 Ohio 477; *Harrington v. Watson*, 11 Oreg. 143, 3 Pac. Rep. 173, 50 Am. Rep.

<sup>7</sup> *Paxson & Comfort Co. v. Potter*, 30 Pa. Super. Ct. 615. A single leased room is a "tenement" within the meaning of that word as employed in a statute permitting "the tenant of any tenement which may be, without his fault or neglect, so injured as to be unfit for occupancy" to abandon it. *Miller v. Benton*, 55 Conn. 529, 13 Atl. Rep. 678. The tenant of the apartments in an upper story of a building which is destroyed by fire during the term, is excused from paying the rent by the burning of the building where there is no covenant on the part of either party of the lease to repair or rebuild. The fact that the tenant had the use of a well with other tenants does not alter the rule. *Camp v. Casey*, 7 Pa. C. C. 160.

is at an end. The tenant obviously cannot claim possession of that which no longer exists, nor can he compel his landlord to erect a building in which to give him similar accommodations. On the other hand the right of the landlord to rent even at common law ceases to exist on the destruction of the premises where a tenant has merely a lease of rooms and apartments and no interest in, or right to the possession of the land.<sup>8</sup> Where a room in a building, or some distinct part of a building as a cellar, or in other words where a separate and distinct part of a building as distinguished from the land with the whole building upon it is leased and the leased portion of the premises is destroyed by fire during the term the leasehold estate ceased. The term is at an end for the reason that the particular apartments or portion of the building which was the sole subject of the lease no longer exists absolutely or in their condition as it was when leased. The reason given by the authorities for this rule is that under such circumstances a lease of a separate portion of the building gives no interest in the land.<sup>9</sup> The lease of a cellar and a lower room of a building which is several stories in height confers no interest in the land upon the lessee. On the total destruction of the whole building by fire the term is at an end, the lessee's interest is gone and he has no right to a further posses-

<sup>8</sup> *Gavan v. Norcross*, 117 Ga. 356, 43 S. E. Rep. 771 in which the court says, "The interest of trade requires that the landlord should be free to build any kind of structure, instead of being bound to replace one like that destroyed, though it had proved to be too large or too small, or otherwise unsuited to existing conditions and though the tenant's term was shortly to expire. Hence, where no interest in the land is conveyed, and the lease is of an apartment, a loss of the structure leaves nothing upon which possession under the contract can operate, and whatever incidental right in the land the tenant had terminates with the destruction of the building."

<sup>9</sup> *McMillan v. Solomon*, 42 Ala. 356, 94 Am. Dec. 654; *Ainsworth v. Ritt*, 38 Cal. 89; *Alexander v. Dorsey*, 12 Ga. 12, 56 Am. Dec. 443; *Chesebrough v. Pingree*, 72 Mich. 438, 40 N. W. Rep. 747, 1 L. R. A. 529; *Stockwell v. Hunter*, 11 Met. (Mass.) 448, 45 Am. Dec. 220; *Shawmut National Bank v. Boston*, 118 Mass. 125; *Graves v. Berdan*, 26 N. Y. 498; *Winton v. Cornish*, 5 Ohio 477; *Harrington v. Watson*, 11 Oreg. 143, 3 Pac. Rep. 173, 50 Am. Rep. 465; *Wattees v. South Omaha Ice & Coal Co.*, 50 Neb. 251, 69 N. W. Rep. 785, 36 L. R. A. 424, 61 Am. St. Rep. 554; *Waite v. O'Neill*, 76 Fed. Rep. 408, 22 C. C. A. 248, 34 L. R. A. 550.

sion of the cellar.<sup>10</sup> The rooms or portion of the building occupied by the tenant must be actually obliterated or so far destroyed that they will have to be substantially rebuilt. If they are merely damaged so that the tenant can occupy them, repair the damage and restore them to their original condition, he is bound to remain and do so, unless the landlord has agreed to repair, and he will have to pay rent whether he remains or abandons the premises.<sup>11</sup> The rule that where a lease is only of a part of a building as of a floor or a part of a floor, the destruction of the entire building by fire terminates the lease, applies only to cases where the building is in fact destroyed or damaged to such an extent as to render the demised portion untenantable. Though the premises may be damaged the lease is not terminated, if they are capable of repair.<sup>12</sup> Where furnished apartments have been let orally and the house is destroyed by fire in the middle of a rental period an action may be maintained for use and occupation down to the time of the fire where it appears that the parties have agreed that the tenant's liability shall cease with the destruction of the premises.<sup>13</sup>

**§ 790. The tenant's right to equitable relief.** The court of chancery in England in a few early cases attempted to establish the doctrine that a tenant might be relieved from the payment of his rent in equity when the premises were totally destroyed by fire or by other unavoidable casualty and the landlord had neglected to rebuild,<sup>14</sup> particularly if the landlord had received the insurance money after the fire had taken place. In cases subsequently decided the court repudiated and overruled the early cases and, following the rules of the common law under which it was admitted that a tenant sued on a covenant to pay rent could not escape liability by showing the destruction of the premises; the Chancellor refused to give him any equitable re-

<sup>10</sup> Winton v. Cornish, 5 Ohio 477. But *contra* in the case of the lease of a room leased with the use of steam power. Marshall v. Scofield, 47 L. T. 406, 31 W. R. 134.

<sup>11</sup> Smith v. McLean, 123 Ill. 210, 218, 14 N. E. Rep. 50; affirming 22 Ill. App. 451.

<sup>12</sup> Nonotuck Silk Co. v. Shay, 34 Ill. App. 542, 547.

<sup>13</sup> Parker v. Gibbins, 1 Q. B. 421, 1 G. & D. 10, 5 Jur. 1036.

<sup>14</sup> Brown v. Quilter, Amb. 619. See, also, Camden v. Morton, cited in 2 Eden, 218 and Steele v. Wright, cited in Doe v. Sandham, 1 T. R. 705, 708.

lief.<sup>15</sup> This is the rule in equity at the present time. The only possible equitable basis for relief at present under such circumstances would be that the execution of the lease had been procured by fraud, accident or mistake and that a clause of exemption had been omitted. If the tenant neglects to protect himself against the consequences of a total destruction of the building by a proper and simple covenant which a conveyancer or lawyer of the most limited knowledge and experience would and could insert in his lease he will be left to suffer the consequences of his own neglect and folly. For equity will not make a new lease for the parties, but will put the same construction on the tenant's covenant to pay rent as will he put on it by a court of law and will give the same effect to it as a court of law.<sup>16</sup> In the absence of an express statute exempting the tenant from the payment of rent after the destruction of the premises, it is safe to say that he is afforded very little relief in equity. If the tenant has agreed to pay rent unconditionally and without any exemption, and the landlord has not agreed to repair, equity will not ordinarily relieve him from the consequences of his own neglect. Nor will he receive equitable assistance where he has agreed to pay rent and to make repairs except in the case of inevitable accident and destruction by fire without his fault, for under the latter provision there is no implied covenant to repair on the part of the landlord in equity as there is none in law.<sup>17</sup> The tenant whose landlord has expressly agreed to repair may under certain circumstances have been some degree of equitable relief. For where the lease provides that the tenant was to pay rent and the landlord was to repair, equity will at least excuse the tenant from the payment of rent where the building which he occupied was totally destroyed, or rendered uninhabitable during the term, for a covenant to repair by the landlord is equivalent to a covenant by him to re-build and his refusal to re-build will suspend the

<sup>15</sup> Hare v. Groves, 3 Anstr. 687; Holtzapffel v. Baker, 18 Ves. Jr. 115, 4 Taunt. 45; Fowler v. Bott, 6 Mass. 63, 67; White v. Molyneux, 2 Ga. 124, 126; Leeds v. Chatham, 1 Sim. 146.

<sup>16</sup> Patterson v. Ackerson, 1 Edw.

Ch. (N. Y.) 96, 99; Linn v. Ross, 10 Ohio 412, 415, 36 Am. Dec. 95; Bussman v. Ganster, 72 Pa. St. 285, 289; Ward v. Bull, 1 Fla. 271; Robinson v. L'Engle, 13 Fla. 482.

<sup>17</sup> Gates v. Griffen, 4 Paige (N. Y.) 355.

running of the rent during such time as the tenant is deprived of the use of the premises.<sup>18</sup>

**§ 791. The surrender of the premises by the tenant.** A statute releasing a tenant from his liability for the payment of rent in case the premises are destroyed by fire or other casualty does not terminate the lease where the tenant remains in possession.<sup>19</sup> A tenant who claims the benefit of the statute must, within a reasonable time after the premises become unfit for occupation, elect whether he will move out or whether he will remain. He must move out promptly and if he shall remain in possession he waives his exemption under the statute. He cannot retain possession and, at the same time refuse to pay the rent. If he has once elected to remain he cannot subsequently change his intention and surrender the premises.<sup>20</sup> This is the rule even where the statute is silent as to the necessity of a surrender by the tenant. In most cases the statutes expressly permit the tenant either to stay or to remove and where this is so, and equally where it is not so, the statutes do not absolutely annul the lease upon the destruction of the premises. The tenant is relieved from his common law liability to pay the rent if he abandons the premises but he cannot have the benefit of the law and repudiate its principal obligation, which is to surrender the premises in order that the landlord may repair or rebuild them, put them in a habitable state and secure a new tenant.<sup>21</sup> To secure the benefit

<sup>18</sup> Fowler v. Payne, 49 Miss. 32, 79; Howard v. Doolittle, 3 Duer. (N. Y.) 464; Fowler v. Bott, 6 Mass. 63, 67; Phillips v. Stevens, 16 Mass. 240, 241. "The loss of the rent must fall somewhere, and there is no more equity that the landlord should bear it, than the tenant, when the tenant has expressly agreed to pay it, and when the landlord must bear the loss of the property destroyed. Equity considers the calamity mutual. She will not interfere to relieve against the express contract of the tenant." By the court in White v. Molyneux, 2 Ga. 124, 127.

<sup>19</sup> Boston-Block Co. v. Buffington,

39 Minn. 385, 40 N. W. Rep. 361, construing Gen. St. Minn. Supp. 1888, c. 75, § 38a. The tenant cannot remain in possession and counterclaim the expenses of repairing the premises under such a statute. Campbell v. Luck, 25 Ohio Civ. Ct. Rep. 356, construing Ohio Rev. St. § 4113; See, also Penn. v. Kearney, 21 La. Ann. 21.

<sup>20</sup> Roach v. Peterson, 47 Minn. 462, 50 N. W. Rep. 601; (Construing Laws 1883, c. 100); Gay v. Davey, 47 Ohio St. 396, 25 N. E. Rep. 425. (Construing Rev. St. § 4113 expressly requiring a surrender.)

<sup>21</sup> Gay v. Davey, 47 Ohio St. 396, 25 N. E. Rep. 425; Johnson v. Op-

of these statutes the tenant of damaged premises must surrender and yield up to the landlord all that remains of the premises which were embraced in the lease without any purpose or intention of returning to them. The onerous obligation imposed by the common law on the tenant is taken from him only upon his exact compliance with the terms of the statute. These statutes give the landlord no power to terminate the lease on the destruction of the premises. They place that power in the hands of the tenant exclusively. It is for him to elect whether he will end the lease or not and he must elect in some unequivocal manner. He may waive his statutory right by remaining in possession but he cannot remain without paying rent. If he desires to retain the benefits of possession he will thereby keep the lease in full force and must pay rent for it. He cannot be permitted to avail himself of the benefit of the lease without being liable for its obligations. He cannot at the same time affirm so much of the lease as is to his advantage, and repudiate so much of it as is a burden upon him. He may avail himself of the benefits of it or continue to perform the covenants of the lease and remain in possession but he cannot do both.<sup>22</sup> The statute dissolves the relationship of

Oppenheim, 55 N. Y. 280, affirming 35 N. Y. Super Ct. 440.

<sup>22</sup> Johnson v. Oppenheim, 55 N. Y. 280, 289, 14 Abb. Pr. (N. Y.) 449; affirming 35 N. Y. Super Ct. 440; Gay v. Davey, 47 Ohio St. 396, 407; Roach v. Peterson, 47 Minn. 291, 50 N. W. Rep. 80; Lansing v. Thompson, 8 App. Div. 54, 40 N. Y. Supp. 425, 427; Danziger v. Falkenburg, 64 Hun (N. Y.) 635, 18 N. Y. Supp. 927; Smith v. Kerr, 108 N. Y. 31, 34. In Louisiana Rev. Civ. Code, art. 2697 provides that if, during the lease the thing leased be destroyed or taken for a public use wholly or in part the lease shall be at an end, or if the lessee elect there may be a diminution of the rent. So too a lease may be annulled where by some unforeseen event the premises become unfit for use. The purpose of the statute is not to

favor the cancellation of leases except in extreme cases but rather to indemnify the lessee for temporary inconvenience. Dussnan v. Husband, 6 La. Ann. 279; Foucher v. Choppin, 17 La. Ann. 322; Denman v. Lopez, 12 La. Ann. 823; Penn. v. Kearney, 21 La. Ann. 23; Meyer v. Henderson, (La. 1894) 16 So. Rep. 729. The tenant who claims the benefit of the statute must move out and surrender possession within a reasonable period. Johnson v. Oppenheim, 55 N. Y. 280; Copeland v. Luttgen, 40 N. Y. Supp. 653, 17 Misc. Rep. 604; Lansing v. Thompson, 8 App. Div. 54, 56, 40 N. Y. Supp. 425; Stein v. Rice, 51 N. Y. Supp. 320, 23 Misc. Rep. 348. Nine days' delay in removing has been held unreasonable. Nimo v. Harway, 50 N. Y. Supp. 686, 23 Misc. Rep. 126, 53 N. Y. St. Rep. 487. Usually

landlord and tenant between the parties, unless the tenant chooses to continue it.<sup>23</sup> His election to continue as a tenant may be implied from the circumstances. The statute requires him to give no notice to quit. It provides that on the destruction of the premises without his fault he may thereupon quit and surrender possession. He has a reasonable time to make up his mind the length of which depends upon all the circumstances. He has also the right to rescue or remove such of his personal property from the ruins of the premises as may be worth the labor and expense and may remain in possession solely for that purpose during a reasonable period after the building is destroyed without incurring any liability to his landlord. If at the request of his landlord he remains in possession to facilitate the removal of property belonging to the landlord or for any purpose which is solely and exclusively for the benefit of the latter, his possession under such circumstances will create no implication of an election on his part to continue the relationship of landlord and tenant.<sup>24</sup> On the destruction of the premises by fire the relationship of landlord and tenant and the liability of the tenant to pay rent or to repair the premises under his express covenant to do so are at an end. He may at once surrender the premises as they are<sup>25</sup> and the landlord must accept them in the existing condition of untenantability. The tenant is not bound, if he shall elect to surrender the premises, to do any act in connection with them which the fire renders it necessary to have performed.<sup>26</sup>

**§ 792. The construction of express exceptions to the common law rule.** An express provision in a lease that the parties shall not be subject to the rule of the common law by

the tenant's diligence in removing is a question for the jury. *Zimmer v. Black*, 59 Hun (N. Y.) 626, 14 N. Y. Supp. 107; see 15 N. Y. Supp. 107. The fact that the tenant keeps his goods on the premises until he can sell them does not necessarily defeat his right to surrender. *Kelly v. Partridge*, 23 N. Y. Supp. 1027, 4 Misc. Rep. 205, 53 N. Y. St. Rep. 487.

<sup>23</sup> *Smith v. Kerr*, 13 N. Y. St. Rep. 113, 28 Wkly. Dig. 184, 108 N. Y. 31, 15 N. E. Rep. 70; affirm-

ing 33 Hun, 567; *Johnson v. Oppenheim*, 55 N. Y. 280.

<sup>24</sup> *Fleischman v. Toplitz*, 130 N. Y. 349, 31 N. E. Rep. 1089, affirming 57 Hun, 126, 25 Abb. N. Cases, 304, 10 N. Y. Supp. 471; *Faron v. Jones*, 49 Misc. Rep. 47, 96 N. Y. Supp. 316.

<sup>25</sup> *Danziger v. Falkenberg*, 64 Hun, 635, 18 N. Y. S. 927.

<sup>26</sup> *Fleischman v. Toplitz*, 134 N. Y. 349, 354, 31 N. E. Rep. 1089; affirming 57 Hun (N. Y.) 126, 25 Abb. N. C. 304, 10 N. Y. Supp. 471.

which a tenant is responsible for rent though the premises are destroyed, is valid. The parties to the lease may stipulate in express terms that if the premises be partially destroyed or become untenantable by fire, or other means, the tenant shall be relieved from his obligation to pay the rent. Such a provision is unquestionably binding upon the landlord and is advisable to be inserted in all leases. The more explicit the language the less liability will there be for a misconstruction of the lease or a misunderstanding of the rights of the parties. But a provision that a tenant shall not pay rent in case the premises are destroyed does not by implication bind the landlord to restore or rebuild them.<sup>27</sup> The tenant is at liberty to abandon the premises and seek other quarters and the landlord may leave them in a ruinous condition if he shall see fit to do so. A provision in a lease that rent shall cease if the premises are destroyed,<sup>28</sup> or that rent shall cease if they shall become untenantable by fire,<sup>29</sup> means a substantial destruction and a permanently untenantable condition rendering further occupancy impossible and necessitating not merely repairs but rebuilding. Mere damage by smoke or water, rendering the occupation of the tenant unpleasant and inconvenient, is not sufficient to bring the case under the stipulation.<sup>30</sup> And, if the lease provides that if the premises shall be destroyed by fire, the payment of rent and the relation of landlord and tenant shall cease, a mere damage by fire which renders only a part of the premises uninhabitable does not terminate the lease.<sup>31</sup> Under all these provisions that the rent shall terminate on the destruction of the premises it is implied that unless the tenant shall abandon or surrender them promptly or otherwise, he shall not have the benefit of the provisions. The effect of the clause in the lease which provides that rent shall cease in case the premises are destroyed by fire or other means is to terminate the lease at once with all the rights of both parties on the happening of the event. The tenant is no longer liable to rent and the right he may have had to possession ceases the minute he is released from paying

<sup>27</sup> Gavan v. Norcross, 117 Ga. 356, 43 S. E. Rep. 77.

<sup>28</sup> Lewis v. Hughes, 12 Colo. 208, 20 Pac. Rep. 621, 625; Vincent v. Frelich, 50 La. Ann. 378, 23 So. Rep. 373.

<sup>29</sup> Spalding v. Humford, Mo. App. 281.

<sup>30</sup> Lewis v. Hughes, 12 Colo. 208, 20 Pac. Rep. 621.

<sup>31</sup> Wall v. Hinds, 4 Gray (Mass.) 256, 64 Am. Dec. 64; Vanderpool v. Smith, 2 Daly (N. Y.) 135.

rent. He is therefore bound to surrender the premises to the lessor without a demand or notice from the latter.<sup>32</sup> If he shall remain in the premises after the fire he ought, if he intends not to pay rent, promptly to refuse to do so and use due diligence to seek another place. His action in remaining in possession after the fire without protest, and at the same time paying rent, will raise a conclusive presumption against him that the premises were tenantable. And, having thus elected to regard them as inhabitable, he can neither recover the rent which he has paid nor recover damages which he claims to have sustained by reason of the delapidated condition of the premises caused by the fire.<sup>33</sup> So, also, a lessor who may refuse to pay rent under the lease in case the landlord does not repair in a reasonable time after the destruction of the premises, who continues in possession, is estopped to assert that the landlord has broken his covenant to repair or restore the building to a tenantable condition.<sup>34</sup> The general rule that where there is an express covenant to pay rent, the destruction of the buildings on the premises by fire is no defense to a claim of rent, does not apply where it is agreed that the building shall be kept insured by the tenant, and that if they were destroyed by fire the proceeds of the policy should either be used to rebuild the buildings or should be paid to the landlord at his request, and the landlord demands the money, which is paid him, and the tenant withdraws from the premises. From such circumstances there will be an implied agreement that the tenant shall not pay the rent.<sup>35</sup>

**§ 793. The effect of a covenant by the landlord to repair or rebuild.** An exception to the general rule that a tenant has no relief in the absence of statute either in law or in equity against his express covenant to pay rent in case of the destruction of the premises occurs where the landlord has expressly covenanted to rebuild in case of the destruction of the premises, or has expressly covenanted absolutely to repair, without excepting destruction by fire or other unavoidable casualty. If, therefore, the tenant, on the one hand, has absolutely agreed to pay

<sup>32</sup> Buschman v. Wilson, 29 Md. 553, 556; Gates v. Green, 4 Paige Ch. (N. Y.) 355.

<sup>33</sup> Tatum v. Thompson, 86 Cal. 203, 24 Pac. Rep. 1009.

<sup>34</sup> Rogers v. S. E. Grote Paint Co. Mo. App. 1906, 94 S. W. Rep. 548.

<sup>35</sup> Boyer v. Dickson, 1 Phila. 190, 27 L. I. 124.

the rent, and the landlord, on the other, has absolutely covenanted to repair or to rebuild, a refusal by or the neglect of the landlord for an unreasonable time to rebuild on the destruction of the premises will in equity excuse the lessee from paying the rent.<sup>86</sup> And, as these covenants to pay rent and to repair are dependent covenants, the performance by the landlord of his covenant to repair is a condition precedent on his part in an action at law against the tenant to recover rent which the tenant has covenanted to pay. A covenant by the lessor, in case the demised building was wholly or in part destroyed by fire or by other casualty, to repair or to rebuild it within a reasonable time and to have it ready for occupancy by the lessee as soon as possible; and a covenant by the lessee to pay rent during the period of the erection of the new building or for the time of the repairing, if the destruction were only partial, are dependent covenants. The lessor can collect no rent after the total or partial destruction of the premises unless he shall first repair or rebuild within a reasonable time.<sup>87</sup>

**§ 794. The destruction of the premises occurring before the entry by the tenant.** The cases in which the tenant has been compelled to pay rent, though the premises were totally destroyed by some unavoidable casualty, are almost universally cases in which the destruction takes place after the term has begun and after the tenant has entered into possession. How does the law stand where the premises are destroyed or rendered uninhabitable during the interval between the execution of a lease *in futuro* by the parties and the entry of the lessee? Between the date of the lease *in futuro* and the subsequent entry of the lessee, the latter has only an *interesse termini* or a right to take possession at a future date. This is a mere interest in an executory contract of leasing and is very different, both in the parties' right and remedies, from the actual possession of the premises. The term does not vest in the lessee until his entry and consequently he has none of the rights of a tenant in possession. He cannot maintain trespass nor take a release of the fee, nor is he liable for the use and occupation of the premises. And, inasmuch

<sup>86</sup> *Fowler v. Payne*, 49 Miss. 32, 79; *Leavitt v. Fletcher*, 10 Allen, (Mass.) 119; *Bigelow v. Colla-*  
*more*, 5 *Cush.* (Mass.) 226, 231; *Phillips v. Stevens*, 16 Mass. 238, 240.

<sup>87</sup> *Lincoln Trust Co. v. Nathan*, 175 Mo. 32, 49, 74 S. W. Rep. 1007.

as a lease *in futuro* is by implication dependent upon the possession and enjoyment of the premises by the lessee, it follows that a destruction of the premises by fire or other casualty between the making of the lease and the commencement of the term puts an end to the contract for a future lease and discharges the tenant from liability to pay rent.<sup>38</sup>

**§ 795. Deprivation of use of premises by casualties of war.** In a few modern cases in which the question of a lessee's liability for rent during the period he has been deprived of the use of the premises by the casualties of war, the buildings themselves not being actually destroyed, the courts have held diverse opinions. It has been held that the mere ousting of the tenant from possession by the public enemy does not absolve the tenant from his liability on an express covenant to pay rent,<sup>39</sup> where the premises themselves had not been actually destroyed.<sup>40</sup> In a more recent case the court took the attitude that the beneficial use and enjoyment of the building leased and not the building itself were the principal subject matter and consideration of the lease, inasmuch as these were what the parties to the lease had in contemplation in agreeing to pay and to receive the rent; and, for this reason intimated, without actually deciding, that a tenant who had been for a time deprived of the use and possession of the demised premises by the military authorities during the war between the States was exonerated from the payment of rent. In thus suggesting an exception to the ancient and well established rule of the common law the court relied wholly upon what it called the equity of the contract. In other words, it recognized the reciprocal character of the obligations between landlord and tenant, *i. e.*, of the former to give possession and of the latter to pay rent, and that the consideration of the lease is not only possession but possession with the profits of the land. Such being the case, it may be presumed that the lessee takes possession subject to the ordinary risks of losing possession. He

<sup>38</sup> Wood v. Hubbell, 10 N. Y. 479, 488, affirming 5 Barb. (N. Y.) 601. The destruction of premises while a tenant under a lease which had expired was holding over under a parol agreement was under the circumstances a termination of the agreement in Chesebrough v.

Pingree, 72 Mich. 438, 446, 40 N. W. Rep. 747, 1 L. R. A. 529.

<sup>39</sup> Paradine v. Jane, Alleyn., 26; Styles 47; Pollard v. Schaefer, 1 Dallas (U. S.) 210.

<sup>40</sup> Robinson v. L'Engle, 13 Fla. 482; Coy v. Downie, 14 Fla. 544.

may have to continue to pay rent though he loses possession by fire or flood, for against these he may guard himself by the use of extraordinary care and skill or insure himself against damages caused thereby. But he cannot protect his possession against over mastering military power nor foresee, when he signs the lease, the coming internal strife or foreign invasion. Hence, he ought to be released from his covenant to pay rent if he promptly abandons a possession which has become dangerous to his life or property.<sup>41</sup> And the courts of the state of Louisiana have gone beyond this in expressly holding, after a full consideration, that the seizure by the Federal armies during the Civil war between the States, of land under lease and the exclusion of the tenant therefrom,<sup>42</sup> and the surrounding and blockading of leased premises by the contending forces which made the use and occupation by the tenant of no value, though he was not actually ousted,<sup>43</sup> was an eviction which suspended the rent.

**§ 796. General rules which are observed in construing the statutes.** In construing the various statutes which exempt the tenant from the payment of the rent in case of the destruction of the premises by fire or by other casualty, the courts have steadily kept in mind their remedial character and have consequently construed them with strictness.<sup>44</sup> The tendency has been to limit rather than to extend their scope and operation. It is never to be forgotten that the parties have it within their power to regulate the matter by the express terms of the lease, and that if the lessee shall neglect to do so, the court will not make a new lease for the parties by construing the statute to favor him who has been neglectful of his own interests. The lessee who invokes the statute as an affirmative defense must show facts which will bring his case within its provisions. He must of course show that the injury or destruction on which he relies as a reason why he should not pay rent was not caused by his own fault or negligence. He must show facts from which it may fairly be implied that the premises are untenable and this is usually a question for the jury upon all the evidence. In determining

<sup>41</sup> Coogan v. Parker, 2 S. Car. 255, 16 Am. Rep. 659; Bayly v. Lawrence, 1 Bay (S. C.) 499; *contra* Loggins v. Buck's Adm'rs, 33 Tex. 113; Gates v. Goodloe, 101 U. S. 612, 25 Law. Ed. 895.

<sup>42</sup> Zacharie v. Sproule, 22 La. Ann. 325.

<sup>43</sup> Bowditch v. Heation, 22 La. Ann. 356.

<sup>44</sup> Booraem v. Morris, (N. J. 1906) 64 Atl. Rep. 953.

this question the jury may consider the condition of the premises, their situation, the business, or other purpose for which they were used or intended to be used, whether they were occupied at the time of the fire, whether any business was carried on there or interrupted, and all the surrounding circumstances existing at the time of the fire. If the damage to the premises was merely trifling and could be repaired at a slight expense, the tenant must continue in possession, for the case is not usually under the protection of the statute unless it shall actually be shown that the premises are untenantable and unfit for occupation.<sup>45</sup> The construction of the statute is usually strict. Thus, a tenant is not relieved from the payment of rent by the destruction of the premises by reason of a fire under a statute which merely exempts him from liability to rebuild in case of fire.<sup>46</sup> A statute which provides that unless the contrary be expressly provided, the tenant's agreement to repair or to leave premises in repair shall not bind him to erect similar buildings if without his fault or negligence the premises be destroyed by fire, includes buildings only injured by fire.<sup>47</sup> It has been held that the partial destruction of premises, which rendered the whole untenantable until repaired, does not exempt a tenant from the payment of rent where the statute exempts him only in the case of a total destruction.<sup>48</sup> But, under a statute which exempted a tenant from liability for rent in case the premises were destroyed by fire or other accident, it was held that a tenant was entitled to a proportionate abatement of the rent where he had leased a group of buildings in their entirety and one of them was destroyed by fire during the term.<sup>49</sup>

**§ 797. What constitutes unfitness for occupancy under the New York statute.** In construing the New York statute [Law 1860, c. 345], which exempts a lessee from liability for rent where the premises shall, without fault or neglect on his part, "be destroyed or so injured by the elements or any other cause as to be untenantable and unfit for occupancy," it was held that

<sup>45</sup> Wampler v. Weinmann, 56 Minn. 1, 57 N. W. Rep. 157, 158.

<sup>46</sup> O'Neil v. Flanagan, 2 Mo. App. Rep. 884, 64 Mo. App. 87.

<sup>47</sup> Sun Ins. Co. v. Varble, 20 Ky. L. Rep. 556, 46 S. W. Rep. 486.

<sup>48</sup> Boeraem v. Morris, N. J. 1906, 64 Atl. Rep. 953.

<sup>49</sup> Scott Bros. v. Floods Trustee, (Ky. 1907) 99 S. W. Rep. 967.

See further as to the construction of the words "total destruction"

Boeraem v. Morris, (N. J. 1908) 64 Atl. Rep. 953; Walls v. Hinds,

4 Gray (Mass.) 256, 64 Am. Dec. 64.

the destruction or injury referred to was such as would be caused by some sudden, unusual and fortuitous circumstance or calamity,<sup>50</sup> and not by the gradual wear and tear. Relying solely on the words "destroyed" and "injured," the statute has been construed to refer to some sudden obliteration of the whole building or of a material portion of it, and not to a gradual and progressive deterioration solely the result of the natural decay of the materials which compose it.<sup>51</sup> In other words, the statute was not meant to exempt the tenant from his common law implied obligation to repair the ravages of time and wear in the premises.<sup>52</sup> Subsequently, it was held that, though injuries which are the result of the landlord's failure to make ordinary repairs are not within the statute, the tenant might abandon the premises as untenantable under the statute where his apartments were filled with the odor of coal gas, so thick that the occupants of the premises were made ill thereby, the parlor filled with smoke which came through flues from rooms which were occupied by other tenants, and the whole house was shaken by loud explosions which caused the house to tremble as though it were shaken by an earthquake. By these circumstances the house was made unsafe and dangerous, and, though the statute does not require the premises to be unsafe before the tenant may legally abandon them and escape the payment of rent, it follows logically that if the premises are unsafe they must be untenantable and unfit for occupancy.<sup>53</sup> Again, the statute does not apply to a case where

<sup>50</sup> *McMann v. Antenreeth*, 17 Hun (N. Y.) 163.

<sup>51</sup> *Meserole v. Hoyt*, 161 N. Y. 59, 55 N. E. Rep. 274; affirming *Meserole v. Sinn*, 34 App. Div. 33, 53 N. Y. Supp. 1072; *Suydam v. Jackson*, 54 N. Y. 450; *Franklin v. Brown*, 118 N. Y. 110, 23 N. E. Rep. 126; *Daly v. Wise*, 132 N. Y. 306, 30 N. E. Rep. 837; *Sully v. Schmitt*, 147 N. Y. 248, 41 N. E. Rep. 514, 3 Ann. Cases 71, 69 N. Y. St. Rep. 527; *Tallman v. Murphy*, 120 N. Y. 345, 31 N. Y. St. Rep. 483, 24 N. E. Rep. 716; *Vann v. Rude*, 94 N. Y. 901; *McMann v. Antenreeth*, 17 Hun (N. Y.) 163.

<sup>52</sup> *Suydam v. Jackson*, 54 N. Y. 451, 454, 456, citing *Bloomer v. Merrill*, 1 Daly (N. Y.) 485; *Austin v. Fields*, 7 Abb. (N. S.) 29; followed in *Lansing v. Thompson*, 8 App. Div. 54, 56, 40 N. Y. Supp. 425. To same effect *Gulliver v. Fowler*, 64 Conn. 556, 30 Atl. Rep. 852.

<sup>53</sup> *Tallman v. Murphy*, 120 N. Y. 345, 349, 24 N. E. Rep. 716, 23 N. Y. Supp. 17; *Tallman v. Earle*, 3 Misc. Rep. 76. The statute does not apply to the breach of a covenant by the landlord to put in a skylight ventilator in the roof should he build upon land adjoining the leased premises and shut

the defect which rendered the house uninhabitable existed when the lease was executed and there has been no misrepresentation on the part of the lessor.<sup>54</sup> Nor does it cover a case where the premises become unfit for occupancy because the tenant neglects to make ordinary repairs. Its operation is confined to cases where it appears that the operative event rendering the premises untenantable occurred during the term.<sup>55</sup>

off light and ventilation from it. Huber v. Ryan, 26 Misc. Rep. 428, 56 N. Y. Supp. 135. The New York statute relates only to destruction of the premises by some affirmative cause. It does not refer to negative causes as wear and tear and gradual deterioration. The phrase "any other cause" does not enlarge its intendment in that respect. That phrase has to be interpreted according to the setting or society of words in which it is found. It means any other cause of that kind of destruction or injury. It does not mean natural and gradual injury from wear and tear if the word injury any more than the word destruction may be so used. If for example the tenant had a lease for ten years with a covenant by the landlord to repair the running down of the premises from a failure to repair is not within the statute. The common law rule was that when the tenant was deprived of the demised premises by the destruction thereof by an invading army, by fire, water, tempest or any other like cause the tenant had to continue to pay rent unless he had saved himself by a clause in the lease. \* \* \* Our statute was to every one's knowledge passed to do away with this rule. It embraces all such affirmation of destruction or injury rendering the premises un-

inhabitable which occur without the fault or neglect of the tenant but it goes no further. For instance a soap factory with an unbearable stench or a boiler factory with an unbearable din set up next door to the premises would not be within the statute. The phrase "or any other cause" has its limits. Disease infection communicated from the neighborhood and rendering the premises untenantable is not within the statute. Huber v. Ryan, 26 Misc. Rep. 428, 56 N. Y. Supp. 135, 137; Edwards v. McLean, 122 N. Y. 302, 25 N. E. Rep. 483. See, also, as to the extent of the damage by fire when the tenant continues in the possession of the premises. Block v. Katz, 68 N. Y. Supp. 865, 34 Misc. Rep. 778. Fear by the tenant of the house being destroyed because it has been pronounced unsafe is not enough to bring the tenant under the statute. Talmam v. Gashwiler, 1 N. Y. St. Rep. 270. As to the extent of the injury to the premises by fire which will permit the tenant to abandon it under the New York statute see New York Real Estate & Bldg. Imp. Co. v. Motley, 3 Misc. Rep. 232, 22 N. Y. Supp. 705, affirmed in 143 N. Y. 156, 38 N. E. Rep. 103.

<sup>54</sup> Prahar v. Tousey, 87 N. Y. Supp. 845, 93 App. Div. 507.

<sup>55</sup> Meserole v. Hoyt, 161 N. Y. 59, 55 N. E. Rep. 274; Bon v.

**§ 798. The accrual of the rents.** The purpose of the New York statute has been held to be to relieve the tenant from the payment of rent which accrues after the destruction of the leased premises and not to exempt him from the payment of rent which had accrued and was due but was unpaid at that time.<sup>56</sup> So, when an installment rent fell due on a specified day and the premises were totally destroyed on the morning of that day, the tenant, under the statute, was held not thereby to be relieved from the payment of the rent which was due on that day. Inasmuch as the rent may be paid at any time in the day on which it is due, and a tender at any time of the day would have been good, it is, of course, true that the tenant would have had all that day to pay the rent. But, on the other hand, inasmuch as the law disregards fractions of a day, the rent is due at any and every hour of the day, that is, at the first minute of the day as well as at the last. Having therefore accrued, though by a few hours before the fire, the tenant is bound to pay though by the fire he loses the occupancy of the premises for the period for which the rent is paid, the rent being paid in advance. Furthermore, having thus nullified the plain intent of the statute which is to enable the tenant to avoid liability to pay for something he never receives, the court holds that the fact that the day for the payment of the rent falls on a Sunday is immaterial since Sunday, though it be *dies non*, occupies time and that there is no rule of law which prevents contracts to pay rent from maturing on that day as well as on any other day of the week.<sup>57</sup> So, rent which has been paid in advance by the tenant cannot be recovered by the tenant on the total destruction of the premises before the rent is earned. Hence, a tenant cannot maintain an action for unearned rent which he has paid in advance for the premises where they were destroyed by fire, though by the lease it was stipulated that if the premises were destroyed the rent should be paid only to the date of such destruction.<sup>58</sup>

Watson, 4 N. Y. Supp. 872, 24 N. Y. St. Rep. 113; where the cellar was damp to the knowledge of the lessee when he signed the lease and subsequently much water came into the premises.

<sup>56</sup> Craig v. Butler, 31 N. Y. Supp. 963, 83 Hun, 286, 64 N. Y. St. Rep.

733, affirmed in 156 N. Y. 672, 50 N. E. Rep. 962; Parker and Martin, Judges, dissenting.

<sup>57</sup> Craig v. Butler, 64 N. Y. St. Rep. 733, 31 N. Y. Supp. 963, 83 Hun, 286, affirmed 156 N. Y. 672, 50 N. E. Rep. 962.

<sup>58</sup> Werner v. Padula, 167 N. Y.

**§ 799. The negligence or fault of the tenant.** If the statute provides that the tenant may abandon the building if it shall be destroyed without his fault, he must allege<sup>59</sup> and prove that he is without fault. This may be, and usually is implied from the character of the agency of destruction, taken in connection with the tenant's proof of ordinary care on his part to guard against the particular dangerous influence. It is then for the landlord to show by a clear preponderance of evidence that the tenant was negligent or in fault. The fact that the landlord voluntarily repaired the building may justify the jury in finding it was not the fault of the tenant.<sup>60</sup>

**§ 800. The destruction must be sudden and unexpected to bring the case under the statute.** A statute exempting a tenant from rent when the premises shall be destroyed or so injured by elements or any other cause as to be untenantable, has no reference to a failure to make ordinary repairs by the landlord. It applies only to cases where the building becomes untenantable by reason of some sudden and unexpected calamity, as a destruction by fire or flood, by a tornado or earthquake, or by mob violence, or the casualties of war.<sup>61</sup> The construction given to the statute in New York has been followed in other states, the language of whose statutes is similar to or identical with that of the New York statute. So in Minnesota it has been held that the statute which exempts tenants from liability to pay rent where premises "are so injured by the elements or any other cause as to be untenantable," has no reference to the neglect of the landlord to supply steam heat and elevator service as he had bound himself to do in the lease.<sup>62</sup> In Louisiana an overflow of the Mississippi being of frequent occurrence, has been held in several cases not to be "an accident of an extraordinary

611, 60 N. E. Rep. 1122, affirming 49 App. Div. 135, 63 N. Y. Supp. 68; reversing judgment in 60 N. Y. Supp. 553, 29 Misc. Rep. 400.

<sup>59</sup> Roach v. Peterson, 47 Minn. 291, 50 N. W. Rep. 80.

<sup>60</sup> Weeber v. Hawes, 80 Minn. 476, 83 N. W. Rep. 447, 448. The statute of Louisiana Civ. Code art. 2667, 2669 which provides for annulling leases where the premises are destroyed or become un-

tenantable refer to cases where the lessee is not at fault. Senae v. Pritchard, 5 La. 480.

<sup>61</sup> Hatch v. Stamper, 42 Conn. 28, 30; Gulliver v. Fowler, 64 Conn. 556, 30 Atl. Rep. 852; McMann v. Antenrieth, 17 Hun (N. Y.) 163.

<sup>62</sup> Minneapolis Co-operative Co. v. Williamson, 51 Minn. 53, 52 N. W. Rep. 986, 987.

nature that could not have been foreseen by either of the parties at the time the contract was made," within a statute providing for an abatement of rent where a crop has been destroyed by such an accident.<sup>63</sup> But the inundation of a plantation in Louisiana caused by a break in a levee resulting not only in the destruction of a crop, but in keeping the land under water three months, the destruction of bridges, canals and ditches and covering the land with a deposit from three to six inches deep, requiring, in order to raise a crop, the canals to be dug out, the bridges to be rebuilt and new seed cane to be obtained, is a partial destruction of the premises by an unforeseen event, or making them unfit for the purpose for which leased, if leased for a sugar plantation within a statute<sup>64</sup> entitling the lessee to an abatement of rent or an annulment<sup>65</sup> of the lease. A building is not rendered untenantable by the elements where, during the term, it becomes so wet and unhealthy as to be untenantable by reason of springs of water percolating and oozing through and under the basement walls within the provision of a lease that if it were rendered partially untenantable by fire or the elements, an allowance on account of the rent should be made while repairs were being made by the landlord. The phrase "by the elements" within the meaning of the lease refers only to some sudden, unusual and unexpected action of the elements, as floods, tornadoes or the like, occurring during the term and not to natural and ordinary results of causes existing at the time of making the lease.<sup>66</sup>

**§ 801. Waiver of the statutes by the parties.** The law provides that the benefit of the statute permitting a tenant to

<sup>63</sup> Payne v. James, 45 La. Ann. 381, 12 So. Rep. 492; Vinson v. Graves, 16 La. Ann. 162.

<sup>64</sup> Code. art. 2697 (2667) and 2699 (2669).

<sup>65</sup> Viterbo v. Friedlander, 120 U. S. 707, 7 Sup. Ct. 962, 30 Law. Ed. 776, reversing 24 Fed. Rep. Ct. 320. An outbreak of scarlet fever in a hotel in which the tenant and his family reside does not present a case for the application of the statute Laws 1860, c. 345. Majestic Hotel Co. v. Eyre, 53 App. Div. 273, 65 N. Y. Supp. 745 in which

it is said the statute contemplates a physical destruction. The occasion of its passage was to relieve tenants from the payment of rent when the premises were physically destroyed. The rule has been somewhat extended so as to include gradual deterioration by wear and tear. But the statute is still confined to physical causes or injuries rendering the premises uninhabitable.

<sup>66</sup> Harris v. Corlies, Chapman & Drake, 40 Minn. 106, 41 N. W. Rep. 940.

abandon the premises when they are rendered untenantable may be waived by express words. Hence, if the parties to the lease desire to waive the benefit of the statute they may do so, and if they do this the statute will not apply. This they must do by explicit language and no inference of an intention to waive the provisions of the statute will arise from vague or doubtful clauses or will be created by implication or loose construction.<sup>67</sup> A covenant to repair, binding upon the lessee, does not necessarily exempt the lease from the operation of the statute. The lessee is merely bound to repair, but his obligation to repair is subject to his statutory right to abandon the premises if they shall be destroyed or become untenantable without his fault. His obligation to repair does not bind him to repair damages which were caused by reason of a violent storm rendering the premises untenantable. A provision in the lease that a tenant shall insure for his own benefit and shall have no claim upon the lessor in case of a fire, but that he might rebuild, with a subsequent agreement that the lessor should insure, and if the building were destroyed by fire and the lessor received the insurance and failed to pay it to the lessee, the latter might retain rent until the amount thus retained equalled the amount of the insurance, is an express agreement that the tenant shall not be released or the lease be terminated by destruction, and the tenant must continue to pay rent.<sup>68</sup> A stipulation by the landlord to repair generally on notice from the tenant in case of a total or partial destruction by fire with a cancellation of the lease in case the landlord shall elect to rebuild, takes the case out of the statute,<sup>69</sup> and the tenant must pay rent unless the landlord chooses to rebuild after the fire, with an absolute right in the tenant to recover damages in case the landlord refuses to repair.

<sup>67</sup> *Butler v. Kidder*, 87 N. Y. 98; *May v. Gillis*, 169 N. Y. 330, 62 N. E. Rep. 385 reversing 53 App. Div. 393, 66 N. Y. Supp. 4 in which case the lessee had covenanted to make all inside and outside repairs. *Vann v. Rouse*, 94 N. Y. 401.

<sup>68</sup> *Lehmayer v. Moses*, 174 N. Y. 518, 66 N. E. Rep. 1111; affirming 67 App. Div. 531, 73 N. Y. Supp. 1016.

<sup>69</sup> *Roman v. Taylor*, 93 App. Div. 449, 451, 87 N. Y. Supp. 653.

## CHAPTER XXXII.

### THE OPTION TO RENEW THE LEASE.

- § 802. The scope of the chapter.
- 803. The extension of a lease and a renewal distinguished.
- 804. The unilateral character of a covenant for a renewal.
- 805. Stipulations to renew. When they are void for uncertainty.
- 806. The terms and covenants necessary to be inserted in the renewal lease.
- 807. The invalidity of a clause permitting indefinite renewals.
- 808. Time when an option for a renewal of a lease must be exercised.
- 809. The necessity for and the character of notice.
- 810. The specific performance of a covenant to renew.
- 811. Waiver by the lessee of his privilege to renew.
- 812. Conditions precedent to a renewal.
- 813. Waiver of a breach of a covenant in the old lease.
- 814. The rent of a renewal to be determined by appraisal.
- 815. The covenant to renew runs with the land.
- 816. The right of the personal representative of the lessee to a renewal.
- 817. The exclusive option in the landlord to renew the lease.
- 818. Option of renewing lease or paying for tenant's improvements.
- 819. A renewal by an endorsement on the lease.

**§ 802. The scope of the chapter.** In this chapter it is proposed to treat of the covenant of a renewal. This covenant is frequently inserted in leases, particularly in cases where the tenant agrees to make, or contemplates making improvements, upon the property. The general rules of construction will apply to this covenant with a general tendency on the part of the courts to favor the tenant. The circumstances in most cases of the renewal will be considered in ascertaining and endeavoring to ascertain the intention of the parties to the lease. In this chapter we will consider briefly the general rules of the law of contracts as applied to the covenant for a renewal. Thus, a renewal covenant will be considered as to its construction; as to the character of its language and the time when it must be exercised and as to the terms and covenants which are necessary to be inserted in the new lease; the necessity of the giving of notice by a tenant and

the performance of other conditions precedent will also be considered. So, also, the remedy of the tenant to procure the performance of the covenants in equity will be considered.

**§ 803. The extension of a lease and a renewal distinguished.** It is often necessary to distinguish between a lease for a term with a provision that, at the election of the lessee, it shall continue for a further term, and a lease for a fixed term with a covenant that on or before the expiration of the term the lease shall be renewed if the lessee shall so elect. The question is always one of construction, depending wholly upon the language of the lease in each particular case. No general rule can be gathered from the cases by which one can distinguish between a present demise which shall determine at a fixed date or shall endure for a further period thereafter at the option of the tenant, and a lease for a definite term with an agreement to make a new lease when it shall have ended. Thus a lease for a term of five years, with a privilege of renting for another term, requires a new lease to be executed, and a mere holding over by the tenant is not a renewal.<sup>1</sup> But in the same state it has been held that a lease for three years, with a privilege of five years, does not require any renewal for the exercise of the option by continuing in possession extends the lease. The lessee can either go out or stay in at the end of three years.<sup>2</sup> So, where a lease gives the lessee a renewal at his election, and he elects to continue, a present demise is created which is subject to all the conditions and covenants of his former lease and it is not necessary that a new lease should be executed.<sup>3</sup> In the absence of an express provision that a new

<sup>1</sup> Thiebaud v. First National Bank of Vevay, 42 Ind. 212.

<sup>2</sup> Montgomery v. Board of Comrs. of Hamilton County, 76 Ind. 362, 40 Am. Dec. 250.

<sup>3</sup> De Friest v. Bradley, 192 Mass. 346, 78 N. E. Rep. 467. "The covenant to extend this lease, therefore means no more than to prolong or to continue it at the option of the lessees, or that it shall be so prolonged or continued, which clearly forbids the inference that a new lease is to be executed. The language im-

plies as nearly as language can, that if the lessees so signified their wish, the lease was to be a continuing one. Every provision is made for its continuance. The term, the rent, the times of payment, the manner of drawing the water, and every condition to the minutest particular are distinctly stated and agreed upon. Nothing is left to be ascertained or made clear and definite by a new lease. Indeed that would be impossible, and the new lease, if executed, could be but a repetition word for

lease is intended to be executed, the presumption is that no new lease is intended, but that the lessee is to continue to hold under the original lease. The lease must clearly and positively show that the making of a new lease was intended. This must appear from the express language of the parties. The reason for the presumption is the fact that the making of a new lease will involve trouble and expense which should be avoided by the courts, if possible, unless it is very clear that the parties had expressly agreed to incur such trouble and expense. For if the new lease, as is al-

word of the old one with respect to all the terms and conditions of the extended term. It appears to me, therefore, that these words are in no sense stronger or more conclusive for the purpose of showing that a new lease was intended than would have been the words 'with privilege to have,' 'with the privilege of keeping,' 'with the privileges if desired or at the option of the lessee for the further term all of which have been adjudged' . . . to operate as a continuous lease and possession." *Orton v. Noonan*, 27 Wis. 272, 283. "And in the first place I observe, that there is nowhere to be found in the lease any words by which the making or execution of any new lease is expressly provided for, or from which it is fairly and clearly to be implied. And observing this, and finding the rule to be laid down, as will hereafter be seen, that such agreements, to be construed as executory and to require the execution of a new lease, must expressly so provide, I have been led to examine somewhat into the adjudged cases in chancery where the specific performance of such covenants has been decreed, and I find in all of them that it was upon language from which the intention to require a new lease

most clearly and unequivocally appeared. The words to grant a further lease under the same rents and covenants, to seal and execute a new lease, to renew the lease at the same rent and on the same covenants, to grant a new lease, to renew the lease upon such terms and for such rent as may be agreed upon, to renew the lease at the expiration of the term at a fair valuation by persons indifferently chosen between the parties, or some other equivalent expressions clearly evincing the understanding of the parties that a new or further lease was to be made and delivered are to be found in every case. The following are some among a greater number of cases which I have examined upon this point. *Bridges v. Hitchcock*, 5 Brown's C. P. 6; *Tritton v. Foote*, 2 Brown's Ch. 497; *Hyde v. Skinner*, 2 Peere Williams, 196; *Moore v. Foley*, 6 Ves. 232; *Whitlock v. Duffield*, 1 Hoff. Ch. (N. Y.) 110; *Willis v. Astor*, 4 Edw. Ch. (N. Y.) 594; *Rutgers v. Hunter*, 6 Johns. Ch. (N. Y.) 215; *Carr v. Ellison*, 24 Wend. 178; *Piggot v. Mason*, 1 Paige (N. Y.) 412." By the court in *Orton v. Noonan*, 27 Wis. 272, 279, followed in *Kollock v. Kaiser*, 98 Wis. 104, 73 N. W. Rep. 776.

ways the case, when executed, is but a substitute for and a re-execution of the old lease, it is in no wise more efficacious or obligatory nor does it confer any greater rights than the latter. Hence, a court of equity will not direct the performance of a useless ceremony but will regard the language of such leases, as conferring a vested interest in the lessee at their execution with an option in him to continue or determine that interest at some future date. In all cases where, from the language of the lease, viewed in connection with the circumstances of the case, it is clear that an execution of a new lease was not the intention of the parties but that the provision was for an extension, the continuing in possession of the lessee after the lease has expired without notice to the landlord unless notice is expressly required, is an extension of the lease and operates to continue the relation of the landlord and tenant.<sup>4</sup> A clause giving the lessee the privilege of keeping and

<sup>4</sup> *Thiebaud v. Bank of Vevay*, 42 Ind. 212; *Montgomery v. Hamilton County Board of Comrs.*, 76 Ind. 362, 365, 40 Am. Rep. 250; *Terstegge v. First German M. & B. Soc.*, 92 Ind. 82, 40 Am. Rep. 145; *Connor v. Withers*, 20 Ky. Law Rep. 1326, 49 S. Rep. 309; *Unger v. Bamberger*, 6 Ky. Law Rep. 447; *Sweetser v. McKenney*, 65 Me. 225; *Holley v. Young*, 66 Me. 520, 522; *Kramer v. Cook*, 7 Gray (Mass.) 550; *Kimball v. Cross*, 136 Mass. 300, 303; *Weed v. Crocker*, 13 Gray (Mass.) 219; *Dix v. Atkins*, 130 Mass. 171; *Delashman v. Berry*, 20 Mich. 202, 4 Am. Rep. 392; *Insurance & Law Building v. National Bank of Missouri*, 5 Mo. App. 333; *Ranlet v. Cook*, 44 N. H. 14, 512; *Hausauer v. Dahlman*, 72 Hun, 607, 25 N. Y. Supp. 277; *Chretien v. Donay*, 1 N. Y. 419; *Clendinning v. Lidner*, 9 Misc. Rep. 682, 683, 30 N. Y. Supp. 543; *Voege v. Ronalds*, 83 Hun. 114, 115, 31 N. Y. Supp. 353; *Mcclelland v. Rush*, 150 Pa. St. 57, 24 Atl. Rep. 354; *Ewing v. Miles*, 12 Tex. Civ. App. 19, 33 S. Rep. 235; *McBrien v. Marshall*, 126 Pa. St. 290, 396, 17 Atl. Rep. 647; *Harding v. Seeley*, 148 Pa. St. 20, 23 Atl. Rep. 1118, 29 W. N. C. 558. "The question whether a written instrument is a lease, or only an agreement for a lease, depends," observes Ames, J. in *Kabley v. Worcester Gas Light Co.*, 102 Mass. 392, "on the intention of the parties to be collected from the whole instrument. *Bacon v. Bowdoin*, 22 Pick. 401. The form of expression we agree to rent or lease, is far from being decisive upon this question, and does not necessarily import that a lease is to be given at a future day. On the contrary, those words may take effect as a present demise, and the words agree to let, have been held to mean exactly the same thing as the word let unless there be something in the instrument to show that a present demise could not have been in contemplation of the parties" \* \* \* In *Kramer v. Cook*, 7 Gray 550 the contract was "to hold for the term of three years from the date

occupying the premises for such further time after the end of his term as he shall elect, paying the same rent, therefore is not an agreement for a renewal, but merely creates a tenancy from year to year after the end of the term which may be terminated at the pleasure of either party on proper notice.<sup>5</sup> A lease for the term of "one year with the privilege of five years on the 1st day of February, 1901," is a lease for five years, the term of which ends February 1st, 1906.<sup>6</sup> These leases for periods in the alternative at the option or election of the tenant are not renewals or extensions of the original lease calling for the execution of a new lease by the landlord. If the tenant makes the election the lease becomes a lease both for the original term and the extended term as he holds under the original demise. The original lease is for a fixed period absolutely and the lease created by the exercise of the tenant's election is a lease upon condition precedent which, when it is fulfilled or performed, the original lease runs into the conditional lease constituting one absolute and continuous term. The event on which the conditional lease is to become absolute may be, and it usually is, some act to be done or performed or notice to be given by the lessee. His act or notice does not make the contract but only renders that absolute which was before contingent. Hence, if the original lease was in writing, the defense of the statute of frauds cannot be interposed to the exercise of the lessee's option.<sup>7</sup>

**§ 804. The unilateral character of a covenant for a renewal.** A covenant to renew, in order to be binding on the landlord, must be in the lease itself. A subsequent promise to renew by the landlord without consideration will not be binding upon him, but a subsequent promise made during the term by the

hereof \* \* \* and, at the election of the said Cook, for the further term of two years, next after said term of three years, yielding and paying, etc." "The provision in the lease, remarks Thomas, J., is not a mere covenant for renewal; no formal renewal was contemplated by the parties. The agreement itself is, as to the additional term, a lease *de futuro*, requiring only the lapse of the preceding term and the

election of the defendant to become a lease *in presenti*. All that is necessary to its validity is the fact of election." By the Court in Holley v. Young, 66 Me. 520, on page 522.

<sup>5</sup> Western Transportation Co. v. Lansing, 49 N. Y. 499.

<sup>6</sup> Connors v. Clark, 79 Conn. 100, 63 Atl. Rep. 951.

<sup>7</sup> Sheppard v. Rosenkrans, 109 Wis. 58, 85 N. W. Rep. 199.

landlord to give a renewal at its end upon the consideration that the tenant will pay an advanced rent, or will refrain from moving out, is based upon a valid consideration. On the other hand, it has been held that an agreement for a renewal in consideration of money which the tenant had laid out in repairing the premises which he was bound to do under the lease, was not valid and binding on the landlord. Inasmuch as it was without consideration, the latter was not precluded from denying its validity as a promise to give a new lease by the mere fact that the tenant, relying upon it, had expended considerable money in repairing the premises<sup>8</sup> as he had covenanted to do by the lease. If, however, the landlord has covenanted to repair, and the tenant does the repairing upon the landlord's promise to renew, the promise may be enforced, as the doing of repairs by the tenant, which he was not bound to do by the lease, is a good and valuable consideration. A covenant by a lessor to the effect that if the lessee should pay the rent and perform all the covenants of the lease on his part, the lessor "shall and will, at the end or expiration of the term," grant to the lessee a new lease for a further term at a rent to be determined by an appraisal, creates in the lessee an option for a new lease which he may decline to exercise. There is no implied covenant on the part of the lessee from the use of such language that he will take a renewal. Doubtless, the lessee may bind himself to take a renewal and he may do so by implication arising from the words of the lease if it shall appear clearly that such was his intention. But ordinarily a stipulation giving a right, privilege or option to the lessee to renew is not mutual in its character, and it cannot be implied from such words alone or from analogous terms that the lessee has covenanted to remain after the term has expired or has covenanted to accept a new lease.<sup>9</sup>

<sup>8</sup> Robertson v. St. John, 2 Bro. P. C. 140.

<sup>9</sup> Bruce v. Fulton National Bank, 79 N. Y. 154, 166; citing Churchward v. Queen, L. R. 1 Q. B. 173; Hudson Canal Co. v. Penn. Coal Co., 8 Wall (U. S.) 276; Maryland v. Railroad Co., 22 Wall (U. S.) 105 and Booth v. Cleveland Rolling Mill Co., 74 N. Y. 15. "It is very plain that here is a covenant by the lessor only,—an agree-

ment by her to give a new lease. There is none by the lessee to accept it. If we consider it in connection with the covenants that preceded it we see that it thus expresses the whole intention of the parties for such is their language. It declares a covenant on the part of one to do the act. If it had been intended to bind both or to impose a correlative obligation on the other, we should expect a clear

**§ 805. Stipulations to renew; when they are void for uncertainty.** If from the covenant to renew or from the lease itself the duration, terms, conditions and obligations of the parties to be inserted in a new lease can be ascertained, the agreement for a new lease will be regarded in equity as sufficiently clear and definite to support an action for its specific performance.<sup>10</sup> If however the parties to a lease in inserting a renewal clause attempt to state in it the rate at which rent shall be payable under the new lease and fail to do so with certainty the clause may be void.<sup>11</sup> So a covenant to renew upon such terms as the lessors, their heirs, etc., should think proper and if they be approved by the tenant, is void for uncertainty.<sup>12</sup> So a covenant by the lessor to let the premises to the lessee on the expiration of the existing lease without mentioning the rent or any other particulars is void for uncertainty.<sup>13</sup> So a covenant to give a new lease at such rent and upon such terms as the parties may agree upon may be void for uncertainty. But a stipulation that at the expiration of the lease the tenant's improvements should be valued in the mode provided in the lease and that if the lessor did not pay for them according to that valuation then he should renew the lease, or redemise the premises, at such rents and on such terms, as might be agreed upon between the parties is not void for uncertainty; and the lessee is bound to accept a lease for the

statement to the effect, not only that one would give but that the other would take a lease or the use of words from which necessarily such an agreement must necessarily have been implied. It is not a present grant accepted by the other party, but a conditional promise or covenant to grant in the future a further term. It may be regarded as an offer for the benefit of the lessee, or as an inducement for him to build upon or improve the premises, giving assurance that if he did so he should enjoy the fruits of his expenditure for a longer period." Bruce v. Fulton Nat. Bank, 79 N. Y. 154, 163.

<sup>10</sup> Harthill v. Cooke's Ex'r 19

Ky. Law Rep. 1524, 43 S. W. Rep. 705; Reed v. Campbell, 43 N. J. Eq. 406, 4 Atl. Rep. 433; Tracy v. Exchange, 7 N. Y. 462, 474; Abeel v. Radcliffe, 13 Johns (N. Y.) 297; Bernstein v. Heineman, 51 N. Y. Supp. 467.

<sup>11</sup> Morrison v. Rossignol, 5 Cal. 64.

<sup>12</sup> Whitlock v. Duffield, 1 Hoff. Ch. (N. Y.) 110.

<sup>13</sup> Abeel v. Radcliff, 13 Johns. (N. Y.) 297, in which the court said in substance that the parties having omitted to state the term of the new lease the court could not make a contract for them. Citing Clinan v. Cooke, 1 Sch. & Lef. 22.

same term and at the same rent as the old lease but without any covenant by the lessor to pay for buildings.<sup>14</sup> A covenant that the lessee shall have "the refusal of the premises at the expiration of the lease for a specified time is not void for uncertainty. It is equivalent to a covenant to renew at the same rent for the same term. It is violated by the lessor refusing to give a new lease except at an increased rent and the acceptance by the lessee of a new lease at an increased rent is not a waiver of the lessor's covenant.<sup>15</sup> A covenant in connection with a renewal "providing said parties can agree upon terms or that said lessee is willing to give as much as any other responsible party will give," is not so uncertain or so indefinite in meaning as to be void. It is similar in principle to a covenant which provides that the rent shall be fixed by appraisal. The expression "what responsible parties will agree to give" when applied to renting business property means its highest rental value.<sup>16</sup>

**§ 806. The terms and covenants necessary to be inserted in the renewal lease.** A covenant by the lessor to

<sup>14</sup> *Rutgers v. Hunter*, 6 Johns. Ch. (N. Y.) 215.

<sup>15</sup> *Tracy v. The Albany Exchange Co.*, 7 N. Y. 472.

<sup>16</sup> *Arnot v. Alexander*, 44 Mo. 25, 27. See, also, *McAdoo v. Callum*, 86 N. Car. 419, 423, in which case the lessee was to have the refusal of the premises for another year. *Renoud v. Darham*, 34 Conn. 513. A provision that "Said party of the second part, its successors or assigns, to have the privilege of renewing this lease from year to year, upon notice to that effect in writing, given on or before the day of the date of the expiration of each and every year, by written notice addressed to the party of the first part at her last known address"—is not indefinite, *Hoff v. Royal Metal Furniture Co.*, 103 N. Y. Supp. 371. In *Reed v. Campbell*, 43 N. J. Eq. 406, 4 Atl. Rep. 433, the court in construing a provision "that at the expiration

of the lease the tenant shall have the first right to lease the said premises for the next succeeding year or years," said, "Certainly there is nothing in all this to sustain the allegation that there was an express agreement to renew the existing lease. What can the court do in such a case, supposing the injunction stands till final hearing? How is it possible for the court to aid the complainant without the risk of doing the greatest injustice. It was not agreed that the former lease should be continued—but only the first right to a lease. "What shall be the terms of that lease? Has this court the right to fix the amount of the rent, the times when the rent shall be due, the length of the term, and the obligations of either party to the other respecting repairs, underletting and other methods of use and enjoyment."

let the premises to the lessee at the expiration of the term without mentioning any rental for the new lease differs materially in meaning from a covenant to renew and is void for uncertainty as the rental will not be determined by the terms of the prior lease. But a covenant for a renewal of a lease at the option of the lessee or stating that the lessee shall have the refusal of a lease of the premises at the expiration of the term is on a different basis. A covenant for a renewal need not mention the rate at which rent shall be payable under the renewed lease, or the length of the term. It may specify the terms and conditions of the renewal, or if it is silent these terms and conditions may be ascertainable by construction from the lease in which the covenant to renew is contained. Though vague its meaning is readily ascertainable by reading the written lease the terms of which will will be presumed to have been in the minds of the parties from the use of the word "renew." If the covenant for a renewal is general and unqualified the court may look to the former lease for the terms and conditions of the new lease, for under such a covenant it will be presumed that the renewal lease was to be for the same duration as the former lease in the absence of a provision to the contrary, and upon the same rent and other terms and conditions as the former lease, except as to the covenant for a renewal.<sup>17</sup> A

<sup>17</sup> Thomas v. Wiggers, 41 Ill. 470; Lyons v. Osborn, 45 Kan. 650, 26 Pac. Rep. 37; Cunningham v. Pattee, 98 Mass. 248, 252; Hughes v. Windpfennig, 10 Ind. App. 122, 37 N. E. Rep. 432; Brown v. Parsons, 22 Mich. 24, 31; Tracy v. Exchange, 7 N. Y. 472, 474, 57 Am. Dec. 538; Newman v. Tolmie, 81 App. Div. 111, 115, 80 N. Y. Supp. 990; Hoff v. Royal Metal Furniture Co. 103 N. Y. Supp. 371; Western New York & P. Ry. Co. v. Riecke, 83 App. Div. 576, 81 N. Y. Supp. 1095; Phelps v. City of New York, 61 Hun, 521; Rutgers v. Hunter, 6 Johns. Ch. (N. Y.) 215, 218; Willis v. Astor, 4 Edw. Ch. (N. Y.) 594; Carr v. Ellison, 20 Wend. (N. Y.) 148; Pigget v. Mason, 1

Paige, (N. Y.) 415; Whitlock v. Duffield, 1 Hoffm. Ch. (N. Y.) 110. A covenant to renew with like covenants entitles the lessor to a renewal containing a covenant to repair on the part of the lessee. Phelps v. City of New York, 61 Hun, 521, 525, 16 N. Y. Supp. 321. A covenant by which the lessor agrees to renew at the expiration of the term for a stipulated rental "subject to certain covenants, provisos, and agreements to be decided upon at that time between the said parties, not embodying in said agreement for a further lease any of the conditions or agreements contained on this present lease," is void for uncertainty. Howe v. Larkin, 119 Fed. Rep. 1005.

covenant for a renewal though general and vague in its language is a covenant to grant an estate, and implies the insertion of such covenants as are incidental to the legal estate according to the tenure by which it is held. A covenant for a new lease implies a covenant that it shall be accompanied by the ordinary covenants, used in similar leases.<sup>18</sup> What such ordinary covenants are is elsewhere discussed. A covenant for a renewal to be enforceable must be sufficiently definite that the court can ascertain the intention of the parties. A lease not under seal for a term of three years "with the option of a renewal" is sufficiently definite to entitle the lessee to a renewal for the same term and at the same rent with this exception, however, that the provision or option for a renewal will not be inserted in the new lease.<sup>19</sup> The court in deciding upon the nature of covenants to be entered into in the renewed lease, will look to the interest of both the parties.<sup>20</sup> Where an agreement to renew a lease contains no stipulation as to the length of the term in the new lease, it would be implied that the new term shall be of the same duration as an old term.<sup>21</sup> The presumption that the new lease is to contain the same terms as the old is always rebuttable by proof of a contrary intention. But a renewal of a coal lease "upon the same terms and conditions" with a provision for the payment of a royalty which is to be not less than a sum stipulated, does not imply or include in the new lease a provision in the old lease which would have the effect of reducing the royalty in case of the working of the mine being suspended, caused by an accident or strike.<sup>22</sup> The omis-

<sup>18</sup> *Vance v. Ranfurley*, 1 Ir. Ch. R. 322.

A covenant for a renewal with no stipulation as to the amount of rent to be paid under the new lease implies a renewal at the rent mentioned in the former lease. *Western New York & P. Ry. Co. v. Riecke*, 83 App. Div. 576, 81 N. Y. Supp. 1093. A covenant that "at the end of the term hereby demised" this lease shall be renewable, at the option of the lessee "and a new lease shall contain all the covenants" contained in the first, allows one

renewal only. *Diffenderfer v. St. Louis Public Schools*, 120 Mo. 447, 25 S. W. Rep. 542.

<sup>19</sup> *Lewis v. Stephenson*, 67 Law J. Q. B. 296, 78 Law T. (N. S.) 165. A covenant for a new lease with the same rent, payments, covenants, etc., is a covenant for perpetual renewals. *Copper Mining Co. v. Beach*, 13 Beav. 478.

<sup>20</sup> *Hare v. Burges*, 3 Jur. (N. S.) 1294.

<sup>21</sup> *Price v. Assheton*, 1 Y. & Coll. 82.

<sup>22</sup> *Consolidated Coal Co. v. Rainey*, 69 Ill. App. 182.

sion in the new lease of an option to purchase which was conferred upon the tenant by the former lease with a mutual understanding that the tenant is not to lose his option, confers upon the tenant a right to exercise his option to purchase at any time during the renewed term.<sup>23</sup> A covenant in a lease binding the lessee not to assign or to sublet without the consent of the lessor, is by implication incorporated in a renewal of the lease.<sup>24</sup> A renewal of a lease upon the same terms as a prior lease includes an obligation on the part of the landlord to give six months' notice of an intention to terminate it which was contained in the original lease. This is one of the terms of the new lease. Hence the landlord can terminate the new lease upon six months' notice prior to its termination where the date named by him for such termination, was in effect the same as was mentioned in the prior lease, although subsequent in point of time.<sup>25</sup> A covenant to renew on the same terms impliedly binds the lessee to furnish as safe a surety for the payment of the rent under the new as under the old lease and if he is unable to do so the lessor may refuse to renew.<sup>26</sup> The tenant is not entitled in the new lease to a covenant to renew or do something else in the alternative. For a covenant of renewal with like covenants does not require the insertion in the new lease of a covenant to the effect that the landlord shall pay the tenant for the premises erected by him on the land, or shall give him a further renewal.<sup>27</sup> A covenant to renew with like covenants does not by implication entitle the lessee to have a covenant for a renewal in the new lease. A covenant by the lessor that he would upon request "from time to time renew the said lease and perfect such other further assurance as the tenant should require," will not be construed as a covenant for perpetual renewals, but rather as a covenant for further assurances.<sup>28</sup> But a covenant that the lessor shall from "time to time renew the lease" should it become determined by the hap-

<sup>23</sup> Abbott v. Seventy-six Land & Water Co. 87 Cal. 323, 25 Pac. Rep. 693.

<sup>24</sup> Walker v. Wadley, 124 Ga. 275, 52 S. E. Rep. 904.

<sup>25</sup> Quidort v. Bullitt, 60 N. J. Law, 119, 36 Atl. Rep. 881.

<sup>26</sup> Piper v. Levy, 114 La. 544, 38 So. Rep. 448, 449.

<sup>27</sup> Leary v. Hutton, 129 N. Y. 649, 29 N. E. Rep. 1028, affirming 12 N. Y. Supp. 471, without opinion and following Muhlenbrinck v. Pooler, 40 Hun, 526.

<sup>28</sup> Browne v. Tighe, 8 Bl. (N. S.) 272, 2 Cl. & F. 396.

pening of certain contingencies, and upon the tenant paying a nominal payment thereon, is a covenant for a perpetual renewal.<sup>29</sup> The court will presume against the construction of covenants for renewal with like covenants that such covenants shall contain a covenant for a perpetual renewal, unless such is clearly the intention of the parties.<sup>30</sup> A covenant for perpetual renewal does not by implication entitle the lessee to a similar covenant in subsequent leases given by the grantees of the landlord. It is sufficient if the subsequent leases contain the original covenant.<sup>31</sup> A covenant to grant a new lease with the same covenants includes all covenants excepting renewal.<sup>32</sup> A covenant by the lessor that he would, upon certain contingencies to happen in the future, grant a renewal "the lessee at the same time surrendering the present demise to be cancelled" does not confer the right to a perpetual renewal on the lessee, nor does it limit the lessee's right to one renewal, but confers a right to have a renewal as often as any of the contingencies mentioned should occur during the term. The fact that the covenant speaks of a surrender of the present demise, does not alter the construction except that it would have to be construed very differently if there was a perpetual right to a renewal.<sup>33</sup> A tenant under a permanent lease renewable forever, is for certain purposes the owner of the property. In some states the land would be assessed for taxation in his name, and if the taxes are unpaid and delinquent, his interest therein may be sold before that of the lessor. And where this is the case, he is sufficiently the owner of the land to authorize him to subscribe to a petition for public improvements under a statute, and the signature of the owner of the fee will not be required to validate an assessment against the premises for

<sup>29</sup> Atkinson v. Pillsworth, Ridgw. 449, Ven. & Scriv. 157.

<sup>30</sup> Moore v. Foley, 6 Ves. 232, 5 R. R. 270; S. P. Baynham v. Guy's Hospital, 3 Ves. 295, 3 R. R. 96; Tritton v. Toole, 2 Bro. C. C. 636, 2 Cox 171.

<sup>31</sup> Copper Mines Co. v. Beach, 1 L. J. (O. S.) Ch. 84.

<sup>32</sup> Furnival v. Carew, 3 Atk. 83.

<sup>33</sup> Swinburne v. Milburn, 54 L. J. Q. B. 6, 9 App. Cas. 844, 52 L.

T. 222, 33 W. R. 325, in which the court said that where words were capable of two constructions, one of which was unusual and not so likely to be in the minds of the parties as the other, the burden is on the party claiming the unusual construction which according to the authorities would mean the perpetual renewal as contrasted with a limited renewal.

such improvements.<sup>34</sup> By statute in some cases leasehold estates with terms renewable forever, are regarded as real estate which is subject to levy and sale as such and bound by the lien of a judgment, the same as other lands.<sup>35</sup>

**§ 807. The invalidity of a clause permitting indefinite renewals.** A covenant for a perpetual renewal is not regarded with favor by the courts.<sup>36</sup> The policy of the law does not favor provisions in leases which in effect provide for a series of perpetual and indefinite renewals of the term at the option of the lessee. Such an agreement is well adapted to prevent not only the free use and sale of land and by thus taking it out of the market to create a perpetuity during the duration of the aggregate terms but also to prevent the improvement of the land while it is in the possession of the lessee. The intention to be invalid must be to create perpetual renewals. This intention, being an unlawful one, will not be inferred, unless it is apparent upon the face of the lease itself. And the courts will, whenever possible, construe the language of the lease in such a way as to avoid the creating of a perpetuity by perpetual renewals.<sup>37</sup> Thus a general covenant to renew implies merely that the lessee shall have one oppor-

<sup>34</sup> *Village of St. Bernard v. Kemper*, 60 Ohio St. 244, reversing 7 Ohio Cir. Dec. 617, 14 R. 134.

<sup>35</sup> *Village of St. Bernard v. Kemper*, 60 Ohio St. 244, reversing 7 Ohio Cir. Dec. 617, 14 R. 134.

<sup>36</sup> *Swinbourne v. Milburn*, 54 L. J. Q. B. 6, 9 App. Cas. 844, 52 L. T. 222, 33 W. R. 325; *Morrison v. Rossignol*, 5 Cal. 64

<sup>37</sup> *Muhlenbrinck v. Pooler*, 40 Hun, (N. Y.) 526; *Bruce v. Bank*, 79 N. Y. 154; *Brush v. Beecher*, 110 Mich. 597, 68 N. W. Rep. 420; *Baynham v. Guy's Hospital*, 3 Ves. 294; *Lewis v. Stephenson*, 67 Law J. Q. B. 296, 300. A covenant to renew does not imply a continuance of an indefinite series of renewals. *Kollock v. Scribner*, 98 Wis. 104; *Orton v. Noonan*, 27 Wis. 272. A lease for

a term of years conditioned for the payment of an annual rent with a perpetual right of renewal, does not divest the lessor of his fees in the premises. *Page v. Esty*, 54 Me. 319. A lease which provides that at the expiration of the term the landlord or his executors shall have an option either to buy the tenant's improvements at a valuation to be determined by appraisal or to renew the lease, and that in like manner the landlord shall have the same election at the end of each succeeding term, does not provide for perpetual renewals. The lease by its terms bound only the parties and their personal representatives, and not the heirs of either party. Under the local statute it was held that the personal representatives were liable only while they had

tunity to renew for a term equal to the first term and upon the same terms except as to the covenant to renew. A covenant to renew will not by implication be inserted in the new lease. The covenant to renew is usually held to be satisfied by one renewal.<sup>38</sup> There is a presumption in the absence of express language to that effect that a landlord by a covenant to renew does not intend to enter into a covenant conferring the right to perpetual renewals. If, however, the intention is clear, the court will unquestionably give effect to that intention.<sup>39</sup> So, too, a covenant that at the end of the term the lease shall be renewable at the option of the lessee, and that every new lease shall contain all the cove-

assets in their hands. *Brush v. Beecher*, 110 Mich. 497, 68 N. W. Rep. 420.

<sup>38</sup> *Pearce v. Turner*, 150 Ill. 116, 36 N. E. Rep. 962; *Hughes v. Windpfennig*, 10 Ind. App. 122, 37 N. E. Rep. 432; *Cunningham v. Pattee*, 99 Mass. 248; *Ranlett v. Cook*, 44 N. H. 512; *Diffenderfer v. St. Louis Public Schools*, 120 Mo. 447, 25 S. W. Rep. 542; *Rutgers v. Hunter*, 6 John. Ch. (N. Y.) 215; *Tracy v. Exchange*, 7 N. Y. 472; *Western Transportation Co. v. Lansing*, 49 N. Y. 499; *Banker v. Braker*, 9 Abb. N. C. (N. Y.) 411; *Gomez v. Gomez*, 31 N. Y. Supp. 206, 81 Hun, 566 affirmed in 147 N. Y. 195, S. C. 69 N. Y. St. Rep. 501; *Piggot v. Mason*, 1 Paige (N. Y.) 412, 415; *Syms v. City of New York*, 105 N. Y. 153, 11 N. E. Rep. 36; *King v. Wilson*, (Va. 1900) 35 S. E. Rep. 727; *Tischner v. Rutledge*, 35 Wash. 285, 77 Pac. Rep. 388, 389; *Kollock v. Kaiser*, 98 Wis. 104, 73 N. W. Rep. 776; *Winslow v. Baltimore & Ohio R. Co.* 188 U. S. 646, 47 Law Ed. 635, 23 Sup. Ct. 443; *Hyde v. Skinner*, 2 P. W. 196; *Fritton v. Foot*, 2 Bro. C. C. 636, 2 Cox 174; *Russell v. Darwin*, 2 Bro. 638; *Brown v. Tighe*,

8 Bligh (N. S.) 272, 290; *Moore v. Foley*, 6 Ves. 232, *Iggulden v. May*, 9 Ves. 325.

<sup>39</sup> *Hare v. Burges*, 4 Kay & J. 45, 27 L. J. Ch. 86, 3 Jur. (N. S.) 1294, 6 W. R. 144. "Whether or not a lease providing for perpetual renewals is valid, is a question upon which the authorities are not agreed, though perhaps the weight is with the holding that such leases are valid. On principle, it would seem that where a person has the right to convey in fee absolute, his whole estate, he could convey in the same manner a part of it less than the whole. But, be this as it may, the authorities are uniform on the proposition that the law does not favor perpetual leases of the character claimed for this one, and that the intention to create such lease must be expressed in clear and unequivocal language and not be left to mere inference. Courts will also, whenever it is possible without doing violence to the plain meaning of words, so construe the language used as to avoid a perpetuity by renewal." By the court in *Tischner v. Rutledge*, 35 Wash. 285, 289.

nants in the first permits one renewal only.<sup>40</sup> Under a covenant conferring a privilege of a renewal with like covenants as the old lease and binding the lessor to pay for buildings if he does not give a renewal, the lessee is entitled to one renewal and the new lease need not contain a covenant for a renewal or to pay for fixtures if a renewal is not given.<sup>41</sup>

<sup>40</sup> *Diffenderfer v. Board, etc. of St. Louis Public Schools*, 120 Mo. 447, 25 S. W. Rep. 542.

<sup>41</sup> *Muhlenbrinck v. Pooler*, 40 Hun, 526; *Leary v. Hutton*, 58 Hun, (N. Y.) 610, 12 N. Y. Supp. 476, 477. "As the law discourages perpetuities, it does not favor covenants for continued renewals; but when they are clearly made, their binding obligation is recognized and will be enforced. The covenant for renewal is only an incident to the lease, and as it can not be passed without the principal, the conveyance of the principal by a proper description will necessarily carry the incident. They are inseparable, and a right of action can not exist in favor of a person claiming the benefit of the covenant without any right to the possession of the leasehold; but the covenant, being annexed to the estate, runs with it, and can not be retained by itself or assigned or severed so as to give an independent cause of action. A sale of the land under execution will pass to the purchaser all the covenants that run with it as effectually as if he had received a conveyance from the lessee; for, as the purchaser, after he acquires possession, is bound to pay the rent, and in that way assumes the burden of the lease, he has the right to take advantage of the covenants that touch and concern the thing demised, which enhance the value

of the estate." By Richardson, J. delivering the opinion of the court in *Blackmare v. Boardman*, 28 Mo. 420, on page 426. Looking to the history of leases of this description, it becomes still more clear that this is the true construction. The struggle has always been this: The court has felt that where the covenant has been merely in general terms, however large,—where for instance, it has been a covenant to grant a renewed lease "under the like rents, covenants and conditions as were contained in the original lease," or "with all the covenants and conditions contained in the original lease" to construe that as amounting to a covenant for perpetual renewal, would be a surprise to the lessor. It therefore refused to imply upon a covenant so worded, an intention on the part of the lessor that it should operate as a covenant for perpetual renewals. That being the rule of the court in construing a covenant so generally worded conveyancers have taken this course finding that the courts would not imply such an intention, they have said "we will express it." And the course they have taken in order to express it, has been, to add to general words which the courts have held as necessary to imply such an intenton, the words "including this present covenant." *Hare v. Burgess*, 4 K & J. 45,

§ 808. Time when an option for a renewal of a lease must be exercised. The right of a tenant to renew a lease where no date is fixed for the exercise of his option, may be exercised at any time during the continuance of the term.<sup>42</sup> Usually, however, it is expressly provided that the tenant shall have the renewal at the expiration of the term, and where such is the case, it is likely that he will have to wait until that time arrives to exercise his option. In fact in most cases he would gain no advantage by an election to renew the lease made during the term itself, for he cannot tell generally until the term is about to expire, whether or not it will be to his interest to renew. In the absence of a provision expressly indicating the date on which he must serve notice of an intention to renew, the tenant may elect to renew within a reasonable time prior to the date on which his term expires. What constitutes a reasonable time is a question for the court. The tenant certainly cannot after he has voluntarily abandoned the premises, and removed his goods therefrom, elect to renew the lease, and he is therefore estopped from claiming damages for the refusal of the landlord to give him a new lease under such circumstances, though he had an option to renew the former lease. This follows from the principle that by a surrender of the lease the rights and remedies of the parties to it as against each other are at an end.<sup>43</sup> And where the giving of a notice by the tenant of his intention to renew, is a condition precedent to the exercise of his right to a renewal, he cannot exercise such right where he waits until after the lease expires by efflux of time. His delay will unless excused<sup>44</sup> by circumstances cognizable in equity operate as a waiver. Where a tenant has an option in the lease to renew a term at his election for one, two or three years, he must make the election at the end of the first term. He cannot elect during the term and can in any event elect

27 L. J. Ch. 86, 3 Jur. (N. S.) 1294, 6 W. R. 144.

<sup>42</sup> *McClintock v. Joyner*, 77 Miss. 678, 27 So. Rep. 837; *Moss v. Barton*, 35 Beav. 197; *Hersey v. Giblett*, 18 Beav. 174. In the last case a tenant for a year had an option to renew for seven, fourteen or twenty-one years. Having occupied for seven years, he called for a lease and in an ac-

tion for specific performance it was held that he was a tenant from year to year, with an option in the beginning to have a lease for twenty-one years determinable at his option in seven or fourteen years.

<sup>43</sup> *Jackson v. Doll*, 109 La. An. 230, 33 So. Rep. 207.

<sup>44</sup> *Atlantic Product Co. v. Dunn*, (N. C. 1906) 55 S. E. Rep. 299.

only once. If at the end of the term he shall under a right to a new term of one, two or three years, elect either of the shorter periods, his right to elect is gone and he cannot later on elect for another period.<sup>45</sup> Hence it follows that if under a right to renew a lease for a year for one of several periods, the tenant fails to exercise that right at the end of the term but holds over it is gone, and his holding over after the expiration of the original term, makes him tenant at will. He cannot, by a subsequent election to renew his lease deprive the landlord of his common law right to end the tenancy at will at any time.<sup>46</sup> Under peculiar and exceptional circumstances the failure of a tenant to make an election during the term may be excused in equity. A tenant who has an option to a renewal is entitled to specific performance, nor does he lose this right by remaining in possession after the death of the lessor during the term, though he continues in possession four years after the lease has expired. His right to call for a renewal is not lost where there was no time specified in the lease within which he must call for it, and the fact that the executors of the lessor saw fit to allow him to remain in possession without demanding as they had a right to do, that he would either quit or take a new lease, estops them from subsequently refusing to give him a renewal.<sup>47</sup>

**§ 809. The necessity for and the character of notice.** Where a lease conferring an option to renew upon the lessee omits to provide that he shall notify the lessor of his election to renew, a notice from him to his lessor of his intention to renew is not required. In such a case the lessee's merely remaining in possession after the term has expired is an exercise of the option to renew and binds both him and his lessor for a new term.<sup>48</sup> But usually where notice of an intention to renew is required by

<sup>45</sup> *Falley v. Giles*, 29 Ind. 114, 117.

<sup>46</sup> *Perry v. Rockland & R. Lime Co.*, 94 Me. 325, 47 Atl. Rep. 534. Also holding that a privilege given a tenant for a term of one year to renew the same on the same term for one, two, three, four, five, six or seven years gives the tenant a right to renew for any of the periods mentioned. The privilege must be exercised during the

first year. The tenant would have a right to elect but once. Holding over is not an election for it cannot be known from the holding over what term the tenant elects. A notice in writing after the term had expired that the tenant elects to take a seven year lease is not binding on the landlord.

<sup>47</sup> *Moss v. Barton*, 35 Beav. 197.

<sup>48</sup> *Cusack v. The Gunning Sys-*

the terms of the lease to be given by the lessee to the lessor it can not be dispensed with. If a written notice is to be given the lessee must comply with the stipulation for such notice.<sup>49</sup> Whether temporary and partial occupancy of premises by the lessee after the term has expired shall be regarded as a renewal of the lease by the parties, under a clause permitting the lessee to renew, must be determined by the court from all the circumstances, and not solely from the fact of remaining in occupancy after the lease is at an end.<sup>49a</sup> Where a written notice is required by the lease to be given by a lessee it has been held that a tenant's holding over taken alone is not sufficient to dispense with such notice.<sup>50</sup> If the lease does not provide for actual notice by the lessee any holding over by the lessee with the knowledge and consent of the lessor may operate as a renewal of the lease.<sup>51</sup>

tem, 109 Ill. App. 588, *contra* Spangler v. Rogers, 123 Iowa 724, 99 N. W. Rep. 580.

<sup>49</sup> House v. Burr, 24 Barb. (N. Y.) 525; Bradford v. Patten, 108 Mass. 153, 155; Abadie v. Berges, 41 La. Ann. 281, 6 So. Rep. 539; Spangler v. Ringers, 123 Iowa 724, 99 N. W. Rep. 580; McFadden v. McCann, 27 Iowa 252, 254.

<sup>49a</sup> Andrews v. Marshall Creamery Co., 92 N. W. Rep. 706; Storch v. Harvey, 45 Kan. 39, 40, 25 Pac. Rep. 220; Steen v. Scheel, 46 Neb. 252, 256, 64 N. W. Rep. 957; Canal Elev. & Warehouse Co. v. Brown, 36 Ohio St. 660; Thiebaud v. First National Bank, 42 Ind. 212, 220; Renoud v. Daskam, 34 Conn. 512; Bradford v. Patten, 108 Mass. 153.

<sup>50</sup> Jackson Brewing Co. v. Wagner, 117 La. 875, 42 So. Rep. 352; Bradford v. Pattee, 108 Mass. 153; Cooper v. Joy, 105 Mich. 374; 63 N. W. Rep. 414; Gerhardt Realty Co. v. Brecht, (Mo.) 84 S. W. Rep. 217; Emery v. Hill, 67 N. H. 330, 39 Atl. Rep. 266; House v. Burr, 24 Barb. (N. Y.) 525; Chamberlain v. Dunlop, 26 N. E. Rep. 966, 126 N. Y. 45; affirming 8 N. Y.

Supp. 125; Gaggiano v. Giallorenzi, 57 N. Y. Supp. 2; English v. Murtland, 214 Pa. St. 325, 63 Atl. Rep. 882.

<sup>51</sup> Hayes v. Goldman, 71 Ark. 251, 72 S. W. Rep. 563; Lyons v. Osborn, 45 Kan. 650, 26 Pac. Rep. 31; Falley v. Giles, 29 Ind. 114, 116; Brown v. Samuels, 24 Ky. Law Rep. 1216, 70 S. W. Rep. 1047; Kramer v. Cook, 7 Gray (Mass.) 550; Delashman v. Berry, 20 Mich. 292; Insurance & Law Building Co. v. Burns, 5 Mo. App. 333, 71 Mo. 58; Curtis v. Sturgis, 64 Mo. App. 535; Lewis v. Perry, 149 Mo. 257, 50 S. W. Rep. 821; Curtis v. Sturges, 2 Mo. App. Rep'r. 1047; Quade v. Fitzloff, 93 Minn. 115, 100 N. W. Rep. 660, 661; Caley v. Thornquist, 89 Minn. 348, 94 N. W. Rep. 1084; Gerhardt Realty Co. v. Brecon, (Mo.) 84 S. W. Rep. 216; Clark v. Merrill, 51 N. H. 415; Mershon v. Williams, 62 N. J. L. 779, 42 Atl. Rep. 778; Voege v. Ronalds, 31 N. Y. Supp. 353, 83 Hun, 114; Pierson v. Hughes, 78 N. Y. Supp. 223; Kelly v. Varnes, 64 N. Y. Supp. 1040; Long v. Stafford, 103 N. Y. 274,

When the lease provides for the giving of notice by the lessee, if the lessee continue in possession after the expiration of the term with the knowledge of the landlord and particularly where the lessee pays and the lessor receives the rent which accrues after the term has expired, notice may be dispensed with upon the theory that it has been waived by the lessor.<sup>52</sup> But where a lease gives the lessee an option to renew upon notice to the lessor in writing but at an increased rent and the lessee holds over after the expiration of his term and pays the increased rent without giving a notice in writing it will be presumed as a matter of law that notice in writing has been waived, by the lessor.<sup>53</sup> It is usu-

283; *Cairns v. Llewellyn*, 2 Pa. Super. Ct. 599, 39 W. N. C. 251; *Lopper v. Bouve*, 9 Pa. Super. Ct. 452, 41 W. N. C. 566. Where an owner of demised premises near the end of the term gives the lessee notice of the terms and conditions upon which the lease will be renewed, and the lessee makes no express reply, but continues in occupation after the lease has expired, a new contract will be implied upon the terms and conditions stated by the owner. The remaining in possession is in law a virtual assent by the lessee. *Depard v. Wallbridge*, 15 N. Y. 374, 376.

<sup>52</sup> *Boller v. Robinson*, 50 Mich. 264, 15 N. W. Rep. 448; *Lewis v. Perry*, 149 Mo. 257, 50 S. W. Rep. 821; *Bailie v. Plaut*, 11 Misc. Rep. 30, 21 N. Y. Supp. 1015; *Probst v. Roch. St. Laundry Co.*, 171 N. Y. 584, 64 N. E. Rep. 504; *McClelland v. Rush*, 150 Pa. St. 57, 24 Atl. Rep. 354; *Schuck v. Schaub*, 84 N. Y. Supp. 896; *Willoughby v. Atkinson Furnishing Co.*, 93 Me. 185, 44 Atl. Rep. 612. The tenant who has by his lease a right of a renewal on notice may maintain an action in equity to obtain relief from a forfeiture which he in-

curred by his delay in giving the notice. If upon the evidence it is clear that the enforcement of the forfeiture will cause great loss to him and but little if any loss to his landlord, he will be relieved from its effects. Thus where a tenant, relying on his privilege of a renewal, has made great improvements in the premises, and has built up a business therein which is of great value to him, his delay in giving notice of an intention to renew will be excused where it was caused by circumstances over which the lessee had no control whatever and resulted in no injury to the lessor. *Doepfner v. Bowers*, 102 N. Y. Supp. 920.

<sup>53</sup> *Long v. Stafford*, 103 N. Y. 274, 283, 8 N. E. Rep. 522; *In re Zillig*, 13 N. Y. St. Rep. 891; *Stone v. St. Louis Stamping Co.*, 155 Mass. 267, 270, 29 N. E. Rep. 623; *Kramer v. Cook*, 7 Gray (Mass.) 550; *In re Thompson's Estate*, 205 Pa. St. 555, 55 Atl. Rep. 539. "The continuing to occupy the premises, and the payment of the rent at the increased rate stipulated for in case of continuance, were the best possible evidence of the election of the defendant to avail himself of the further term. If it

ally a question of fact where there is no uncontradicted proof of an express waiver, whether a requirement that a notice of an intention to renew shall be given in writing has been waived.<sup>54</sup> A requirement that a notice shall be given to the owner or to his agent is complied with by a notice by the lessee to a clerk of the agent of the lessor who was authorized to receive such notice.<sup>55</sup> The assignment of the lease during the term with a notice to the lessor that the assignees wanted the premises for the additional term and the obtaining the consent of the landlord is a sufficient notice of an intention to renew to render the original lessee liable for the rent of the new term.<sup>55a</sup> The lessor may, if he shall elect to do so, waive the character of the notice so far as it differs in the terms of the new lease from that which has preceded and treat it as a proper notice of a renewal. Thus where a lessee notifies the lessor that he elects to renew for a longer period than he has a right to claim under his covenant for a renewal, the lessor may accept the notice as a valid notice to renew for a term which is within the covenant to renew. The objection to the terms of the offer to renew that it does not correspond with the terms of the lease in some immaterial respects may be waived by the lessor without creating any presumption that the parties have executed a new lease and not a mere renewal of a former one.<sup>56</sup> A tenant who has an option to renew for any one of several periods named must give notice of an intention to renew during the term even

was necessary to prove that the election of the defendant was made at the time of the expiration of the three years the evidence was ample for the purpose. He continued to occupy after the expiration of the three years. He paid the increased rent stipulated for from the time the three years expired." Kramer v. Cook, 7 Gray (Mass.) 550.

<sup>54</sup> McClelland v. Rush, 150 Pa. St. 57, 24 Atl. Rep. 354.

<sup>55</sup> Broadway & S. A. R. Co. v. Metzger, 27 Abb. N. C. 160, 15 N. Y. Supp. 662; Morgan v. Goldberg, 9 Misc. Rep. (N. Y.) 156, 157. A requirement that the tenant shall serve ninety days' notice before

the lease expires, is waived where the tenant serves a notice of fifty-eight days, and continues in possession without any objection on the part of the landlord after the term has expired. Sheppard v. Rosenkranz, 109 Wis. 58, 85 N. W. Rep. 199.

<sup>55a</sup> House v. Burr, 24 Barb. (N. Y.) 525, 526. "The agreement to pay rent was for the term and was co-extensive with the entire term of the lease, not only as it was originally fixed but as it should be extended according to the provisions of the lease."

<sup>56</sup> Chamberlain v. Dunlop, 126 N. Y. 45, 26 N. E. Rep. 966, 22 Am. St. Rep. 807.

though the lease may not expressly require notice. His mere holding over is not enough to dispense with an express notice as it cannot be told from his holding over for what term he has elected to renew.<sup>57</sup> And it has also been held that where a tenant had an option to renew for two or three years a holding over merely created a tenancy for one year.<sup>57a</sup> A statute which provides that holding over shall not constitute a tenancy for a longer term than the shortest interval between the payments of rent under the expired lease, has no application to a holding over after a lease in which there is an express provision for a renewal. The statute will be confined in its effect to leases in which there are no express stipulations to renew.<sup>58</sup> The tenant may explain his intention in remaining in possession after the term has expired to rebut the inference that, by remaining in possession he meant to exercise an option to renew which was contained in the lease. He may, therefore, when he is sued for rent as upon a renewed term created by holding over show by parol evidence that his continuing in possession was upon the promise of the landlord to do some act which would operate as a condition precedent to a renewal. Thus he may show that the landlord had promised him that if he would renew the lease he would repair the premises and he may further show that the landlord has failed to perform this promise from which it may be inferred that, in consequence of this failure upon the part of the landlord to duly perform this condition precedent, no renewal of the lease has been had.<sup>59</sup> The effect of a notice that a tenant elects to renew a lease which is not withdrawn, is not destroyed by the fact that after the landlord refused to renew the lease, the tenant looked for other premises which he might occupy if he considered it advisable to withdraw his offer to renew.<sup>60</sup> A notice of an election to renew in order to be binding upon the lessor must state an intention to renew on such terms and for such a period as are specified in the lease. If the lessee has an option to renew for a period particu-

<sup>57</sup> *Perry v. Rockland & R. Lime Co.*, 94 Me. 325, 47 Atl. Rep. 534.

W. Rep. 263; *Stees v. Bergmeier*, 90 Minn. 513, 98 N. W. Rep. 648.

<sup>57a</sup> *Whetstone v. Davis*, 34 Ind. 510; *Falley v. Giles*, 29 Ind. 114.

<sup>59</sup> *Fisher v. Nergararain*, 112 Mich. 327, 70 N. W. Rep. 1009.

<sup>58</sup> *Quade v. Fitzloff*, 43 Minn. 115, 100 N. W. Rep. 660, 661, citing *Smith v. Bell*, 44 Minn. 524, 47 N.

<sup>60</sup> *Holt v. Nixon*, 73 C. C. A. 268, 141 Fed. Rep. 952.

larly specified or at a particular rental a notice by him that he will renew for a different period or at a different rental is nugatory and it may be ignored by the lessor. In fact such a notice of an election to renew the lease on different terms is an offer, not to renew, but to make another lease and it will be regarded by the law as an implied election not to renew the old lease.<sup>61</sup> Where the serving of a notice, before the expiration of the term, of an intention to renew is a condition precedent to the granting of a new lease, it may be given on any day before expiration. It is not necessary that a new lease shall be executed before the term expires. If there is a fine to be paid, it may be paid on the actual execution of the new lease. Where the lessors are trustees the notice to one trustee is sufficient. No particular form of notice is usually necessary.<sup>62</sup>

**§ 810. The specific performance of a covenant to renew.** A lessee whose right to a renewal under a covenant has been denied may elect whether he will proceed in equity for the specific performance of the covenant by the lessor or whether he will sue at law for damages.<sup>63</sup> That a court of equity will decree the specific performance of a covenant to renew a lease which is binding on the lessor upon the application of the lessee is unquestioned.<sup>64</sup> The lessee will undoubtedly be required before a specific performance of a covenant to renew shall be decreed in his favor to perform all the conditions precedent upon his part in a proper and substantial manner.<sup>65</sup> The lessee who asks specific performance of a covenant to give a new lease must show that he has complied with all the conditions required by his old lease and where one of these conditions was his giving of a notice of his intention to renew it cannot be dispensed with and the lessee's failure to perform this condition will deprive him of specific per-

<sup>61</sup> Williams v. Mershon, 57 N. J. Law, 242, 245, 30 Atl. Rep. 619.

<sup>62</sup> Nicholson v. Smith, 52 L. J. Ch. 191, 22 Ch. D. 640, 47 L. T. 650, 31 W. R. 471.

<sup>63</sup> Arnot v. Alexander, 44 Mo. 25, 100 Am. Dec. 252; McClintock v. Joyner, 77 Miss. 678, 27 So. Rep. 837.

<sup>64</sup> Eichorn v. Peterson, 16 Ill. App. 601, 602; Crawford v. Kastner, 63 How. Pr. (N. Y.) 90, 26

Hun, 440; Daniels v. Straw, 53 Fed. Rep. 327; Lewis v. Stephenson, 67 Law J. Q. B. 296, 78 Law T. (N. S.) 165; Rutgers v. Hunter, 6 John. Ch. (N. Y.) 215; Furnival v. Crew, 3 Atk. 83; Ross v. Lord Dacre, cited in 9 Ves. 332.

<sup>65</sup> Gannett v. Albee, 103 Mass. 372; Armiger v. Clark, Bunn. 111; London v. Milford, 14 Ves. 58; Page v. Hughes, 2 B. Mon. (Ky.) 439.

formance.<sup>66</sup> If, however, it shall appear that without fault or negligence on his part, or by an excusable or inadvertent mistake, he has omitted or neglected to perform any of the conditions precedent to the exercise of his right to a renewal, and has thereby legally forfeited his right to renew, equity may relieve him against this forfeiture of his right and decree a specific performance of the covenant to renew with compensation to the lessor for any injury he may have suffered by reason of the conduct of the lessee. If for any reason a covenant to renew can not be fully performed by the lessor, a court of equity will decree a specific performance of as much of it as the lessor may lawfully perform or as much as he has power to perform.<sup>67</sup> The specific performance of a covenant to renew may be denied when sought by the tenant in equity as the covenant itself may be cancelled at the suit of the landlord where the execution of the covenant was induced and procured by the fraudulent conduct or misrepresentations by the tenant. If the tenant was insolvent at the date of the execution of the lease and represented to the landlord that he was solvent and the latter, relying upon the statements of the tenant executed the covenant to renew a court of equity may cancel it on proper application or refuse to decree its specific performance according to the circumstances of the case. In the absence of proof of fraud or misrepresentation at the time of the execution of the lease the mere fact that the tenant shortly after its execution became insolvent does not invalidate the lease.<sup>68</sup> A court of equity will refuse to grant relief to a tenant and refuse to decree specific performance of a covenant to renew whenever the conduct of a tenant as a lessee has been inequitable. So, where a tenant has been guilty of waste or has broken his covenant not to assign his lease, and the landlord, under the clause

<sup>66</sup> *Keppler Bros. Co. v. Heinrich-dorf*, 26 Ohio Cir. Ct. R. 16.

<sup>67</sup> *Bettesworth v. Dean etc. of St. Paul*, 3 Bro. P. C. 389; *Bateman v. Murray*, 1 Ridgw. 170; *Raw-starne v. Bentley*, 4 Bro. Ch. 417. "A clause in a lease for one year giving the lessee the option, on a certain condition, to renew the lease for another year, is not a demise to take effect at the expiration of the first year. It is a mere

covenant or undertaking of the lessor to let the lessee have a second term, which may be enforced on a bill for specific performance, or upon which an action at law may lie for a breach." *Sutherland v. Goodnow*, 108 Ill. 528; *Steen v. Scheel*, 46 Neb. 252, 254, 64 N. W. Rep. 957.

<sup>68</sup> *Olden v. Sassman*, 67 N. J. Eq. 239, 57 Atl. Rep. 1075.

for re-entry, had brought an action for ejectment it was held a court of equity would not enjoin the action.<sup>69</sup> So the court will not decree specific performance of an agreement to renew a lease where the tenant has violated his covenant that the rented premises shall be used as a private residence.<sup>70</sup> So the text books say that insolvency of the tenant is good ground for refusing specific performance of an agreement to renew.<sup>71</sup> In England it has been held that the insolvency of the lessee is a good and valid objection and defense to a bill in equity brought by him to compel a specific performance of a covenant to renew the lease. From this it follows that the solvency of the lessee may be regarded as a condition precedent to a renewal of the lease. This, it seems, is only fair and right inasmuch as the lessor should not be compelled to accept an insolvent tenant when it might be easier for him to procure one who is perfectly solvent.<sup>72</sup> Under the Statute of Frauds an agreement to give a new lease where the term exceeds one or three years according to the circumstances, is required to be in writing and signed by the landlord. A performance of the contract by the tenant will take the case out of the statute. Thus, the conduct of the tenant in remaining in possession after his term and paying an increased rent is a sufficient part performance of an agreement to give a new lease to take the case out of the Statute of Frauds.<sup>73</sup> And the same result would follow where the lessee had built a house upon the premises and the lessor had agreed with him by parol to renew the lease for a term of 21 years.<sup>74</sup> Parol contracts for a renewal of a lease when they

<sup>69</sup> *Hill v. Barclay*, 18 Ves. 56.

<sup>70</sup> *Gannett v. Albee*, 103 Mass. 372.

<sup>71</sup> Taylor on Landlord and Tenant, § 337. The cases cited in support of the latter statement, however, do not support the unqualified language of the text. Lord Eldon in *Buckland v. Hall*, 8 Ves. 92 said, "that insolvency was an objection of weight, and upon that and other circumstances an injunction against an action in ejectment brought by the landlord was refused. There is no doubt, however, that where the tenant has been guilty of inequit-

able conduct, or has become irresponsible, and is unable to assure the execution of the terms of the lease a court will refuse him any affirmative relief." By the court in *Olden v. Sassman*, 67 N. J. Eq. 239, 57 Atl. Rep. 1075 on page 1076.

<sup>72</sup> *Price v. Assheton*, 1 Y. & Coll. 441.

<sup>73</sup> *Nunn v. Fabian*, 35 L. J. Ch. 140, L. R. 1 Ch. 35; followed in *Miller and Aldworth v. Sharp*, 68 L. J. Ch. 322 (1899) 1 Ch. 622, 80 L. T. 77, 47 W. R. 268.

<sup>74</sup> *Mortimer v. Orchard*, 2 Ves. Jr. 242.

are thus performed by the tenant will be specifically enforced in equity.

**§ 811. Waiver by the lessee of his privilege to renew.** A lessee may by his conduct, as well as by his express language, waive his privilege to renew at the expiration of the term. Thus he may waive his right to elect to take a renewal of the lease by a failure to give notice to the landlord in time of his intention to renew where notice by him is required under the lease.<sup>75</sup> He may also waive his right to a renewal upon the terms of the expired lease, or upon particular terms as to the rental and the length of his occupancy by executing a new lease from his lessor upon different terms. It must appear however that the lessee in fact meant to waive his right to a renewal. Thus where a lessor refused to renew, when the lessee informed him of his intention to take advantage of a privilege to renew for a specified period, unless the lessee would pay an advanced rent, and the lessee took a lease for a shorter period at the advanced rent but under protest; it was held that the lessor would be responsible in damages to the lessee for his refusal to give a renewal upon the terms of the former lease. The acceptance of the lease as offered to the lessee by the lessor was no waiver by the lessee under the circumstances.<sup>76</sup> A lessee may lose his right to renew by his silence and his failure to claim it in time.<sup>77</sup> Whether or not the tenant's delay in asking for a renewal will prevent the specific performance of a covenant to renew, on his application depends upon the circumstances of each case.<sup>78</sup> No general rule can be laid down.

<sup>75</sup> Thiebaud v. First National Bank of Vevoy, 42 Ind. 412.

<sup>76</sup> Tracy v. Albany Exchange Co., 7 N. Y. 472, 475. That a lessor has incurred expenses in preparing to carry on his own business in the demised premises after the tenant had expressed his intention of surrendering his possession at the end of the year does not estop the tenant from subsequently during the term insisting upon a renewal of the lease, unless it actually appears that the expenses were incurred by the lessor by reason of the tenant's promise to

surrender the premises. Ewing v. Miles, 12 Tex. Civ. App. 19, 27, 33 S. W. Rep. 235; see, also, Grenier v. Cota, 92 Mich. 23, 25, 52 N. W. Rep. 77.

"Rubery v. Jervoise, 1 Term Rep. 229, 1 R. R. 191; Walker v. Jeffreys, 1 Hare, 341, 11 L. J. Ch. 209, 6 Jur. 336; London City v. Mitford, 14 Ves. 42, 9 R. R. 284; Baynham v. Guy's Hospital, 3 Ves. 295, 3 R. R. 96; London City v. Mitford, 14 Ves. 42, 9 R. R. 234.

<sup>77</sup> Bogg v. Midland Ry. 36 L. J. Ch. 440, 16 L. T. 113; Hunter v. Hopetown, 13 L. T. 130.

Mere neglect of the lessee which is due to ignorance or to excusable inadvertence in exercising an option to renew a lease does not prevent a court of equity from decreeing a specific performance of the contract to renew in his favor at least where the parties to the lease have not expressly made time of the essence of the covenant to renew. Equity will not infer that time is of the essence of an option to renew unless it is expressly so stipulated in the lease. The inadvertence of the party having the option to renew will be overlooked in a court of equity if it would be contrary to good conscience to permit the lessor to take advantage of it, and, particularly where compensation can be made to the lessor for any damage he may have suffered. But equity will not excuse the lessee where his failure to renew was the result of his willful negligence or an express refusal, unretracted and particularly if such refusal was acted on by the lessor. If the lessee has paid his rent promptly as it has fallen due and has otherwise conformed to and kept the covenants of his lease he will be permitted in equity to have a renewal though he may have delayed to exercise his option for that purpose until sometime after the term of the lease has expired.<sup>79</sup> A lessee who, by reason of unavoidable accident, or fraud, or because of surprise or ignorance which is not willful on his part, is prevented from exercising his election to have a renewal of the term under a proviso in the lease conferring a right to a renewal upon the lessee, may have equitable relief. A court of equity will interpose to relieve him from a forfeiture by breach of this condition where a literal performance is impossible, but only where compensation can be made and no injury result to the lessor.<sup>80</sup>

**§ 812. Conditions precedent to a renewal.** Before a lessee can be permitted to claim a renewal of his lease by virtue

<sup>79</sup> Selden v. Camp, 95 Va. 527, 28 S. E. Rep. 877; Lennon v. Napper, 2 Sch. & Lef. 684. Where there is a stipulation that a lease will be renewed by the lessor upon the giving of twenty days' notice by the lessee, the time of the notice is not of the essence of the contract and a renewal will be given on fourteen days' notice. Sunday Creek Coal Co. v. Dikeman, 84 Ill. App. 379.

<sup>80</sup> Cusack v. The Gunning System, 109 Ill. App. 588. In New York Life Ins. & Trust Co. v. Rector of St. George's Church, 64 How. Pr. Rep. 511, 12 Abb. N. C. 50, the delay of 30 days of a lessee to notify his lessor of his intention to renew was excused. The lessor had accepted rent and the lessee would lose about \$38,000 in improvements on the property by a forfeiture.

of a covenant conferring the privilege of a renewal upon him, he must properly and substantially perform all the covenants and conditions in the lease binding upon him and which are precedent thereto. It must appear however from the lease that the performance of the covenants and conditions are prerequisites to the exercise of the privilege or option of a renewal. If it shall appear that the covenant for a renewal is a dependent covenant which is only binding upon the lessor when the lessee shall have performed some other covenant the lessee loses his privilege of a renewal, unless he performs the covenant. Thus the payment of rent when it becomes due and the performance of the other covenants in the lease by the lessee by virtue of which he holds possession of the premises may be conditions precedent to his obtaining the advantage of a covenant to renew.<sup>81</sup> But it has also been said that a tenant does not forfeit his right to a renewal merely because his rent has fallen in arrears, and a court of equity will decree a renewal on his payment of the rent to date.<sup>82</sup> Where a lessee has a privilege of renewal, but the lease contains a stipulation that the lease shall be at an end unless the lessee shall notify the lessor of his intention to renew, and also shall give him security for the rent which shall accrue on the subsequent lease, the giving of security as well as the giving of notice, are conditions precedent to a renewal of the lease. Both are equally necessary, though it is not necessary on the other hand to create a forfeiture that the lessor shall demand that these conditions shall be performed. The performance of these acts is required to keep the old lease in existence, and if they are not performed, the lease expires of its own nature, and no act on the part of the landlord is required to terminate it.<sup>83</sup> Equity has refused to decree the specific performance of a covenant to renew where the lessee, solely by reason of his ignorance or his neglect to perform his covenant which was a condition precedent to a renewal has failed

<sup>81</sup> Behrman v. Barto, 54 Cal. 131; Ranlet v. Cook, 44 N. H. 512, 84 Am. Dec. 92; McFadden v. McCann, 25 Iowa, 252; Maxwell v. Ward, M'Cel. 458, 13 Price, 674, 28 R. R. 725; Finch v. Underwood, 45 L. J. Ch. 522, 2 Ch. D. 310, 34 L. T. 779, 24 W. R. 657; Bastin v. Bidwell, 18 Ch. D. 238, 44 L. T.

742; Job v. Banister, 26 L. J. Ch. 125, 3 Jur. (N. S.) 93, 5 W. R. 177, affirming 2 Kay & J. 374.

<sup>82</sup> Lysaght v. Callinan, Hayes, 141; Fitzgerald v. O'Connell, 6 Ir. Eq. R. 455, 1 Jo. & Lat. 134.

<sup>83</sup> McFadden v. McCann, 25 Iowa 252, 254.

to give written notice of his intention to accept, or to decline a renewal.<sup>84</sup> A failure of the lessor to exercise his right of declaring a forfeiture for a breach of a condition in the lease does not alone entitle the lessee to a renewal under a covenant to renew when such a renewal is dependant upon the complete and faithful performance of all conditions precedent by the lessee.<sup>85</sup> For, the waiver of the forfeiture by the landlord does not of necessity entitle the tenant to a renewal. But where the payment of rent is not expressly declared to be a condition precedent to the exercise of a privilege to have a renewal the fact that the lessee is in arrears for rent when he elects to take a renewal taken alone does not deprive him of his right to a renewal. The covenants to pay rent and the covenant to renew are then independent, and the lessee may bring his action for damages for a failure to renew though he has defaulted in paying the rent.<sup>86</sup> This at any rate is the rule at law where covenants are independent though it is extremely likely that a court of equity in a suit to procure the specific performance of a covenant to renew would view the matter from a different standpoint and require the lessee to perform or to tender performance of all covenants binding on him. Thus where by the express terms of the lease the performance of a covenant by the lessee to erect a building and leave it standing at the end of the term is a condition precedent to the right to renew, the court will not decree a renewal where the lessee is willfully in default on this covenant.<sup>87</sup> The bankruptcy of a tenant for

<sup>84</sup> Keppler Bros. Co. v. Heinrichsdorf, 26 Ohio C. C. 16.

<sup>85</sup> Swift v. Occidental Mining & Petroleum Co., 141 Cal. 161, 74 Pac. Rep. 700, 702; reversing 70 Pac. Rep. 470, on a rehearing. Where the lease provides that it shall be at an end at a certain date unless the lessee notifies the lessor of his election to continue the tenancy, and also gives security for rent which may accrue after the expiration of the term, the giving of the security as well as notice are conditions precedent to a renewal. McFadden v. McCann, 27 Iowa, 252, 254.

<sup>86</sup> Tracy v. Albany Exchange Co., 7 N. Y. 472, 475, 57 Am. Dec. 538; Dawson v. Dyer, 5 Barn. & Ad. 584.

<sup>87</sup> McIntosh v. Rector, 120 N. Y. 7, 12, 23 N. E. Rep. 984. A provision in a covenant for the renewal of a lease, that the same will be granted upon request and at the costs of the lessee means that the lessee shall pay the ordinary expenses and costs of the renewal i. e. the drawing, settling and completing of the conveyances necessary. It does not include the cost of a reference or arbitration had in order to ascertain the

years with a privilege of a renewal does not abrogate the lease so as to enable the landlord to repudiate his obligation to give a renewal. A court of equity will not cancel the renewal clause unless the landlord can show that the lease was obtained by fraudulent representations on the part of the tenant. Where the term of the lease was short and the tenant made no statements of his financial responsibility and went into possession and placed on the premises, which were a farm, the cattle and implements called for by the lease, there is no presumption of fraud on the part of the tenant which will justify a court of equity in setting aside the renewal clause.<sup>88</sup>

**§ 813. Waiver of a breach of a covenant in the old lease.** The execution by the lessor of a new lease under his covenant to renew is not an implied waiver by him of the lessee's breach of any covenant in the lessor's favor in the lease which has expired. The lessor may, unless he has expressly released the lessee, recover rent which was due under the original lease and also damages for the breach of any of its covenants by the lessee. He may recover damages from the lessee for the failure of the lessee to do a particular and specific act in connection with the premises which the lessee was bound to do by the lease which has expired, though the lessee has covenanted to do that particular thing under the new lease.<sup>89</sup> And on the other hand the lessee does not of necessity by renewing the lease relinquish any cause of action which may have accrued to him prior to the end of his former term and under a covenant by the lessor in the former instrument of lease. He may recover for all breaches of covenant by the lessor accruing under the old lease after the execution of the new lease even though there are no covenants of that nature in the new lease.

**§ 814. The rent on a renewal to be determined by appraisal.** The fact that on the renewal of a lease the rental for the new term is to be fixed and determined by an appraisal by arbitrators or appraisers who are named in the lease or who are to be selected by the parties to it does not render the covenant to

premium to be paid by the tenant to the landlord in accordance with the increased value of the premises at the time of the renewal. *Mostyn (Lord) v. Fitzsimmons*, 71 L. J. K. B. 89; (1902)

1 K. B. 512

<sup>88</sup> *Olden v. Sassman*, 68 N. J. Eq. 799, 64 Atl. Rep. 1134, affirming 67 N. J. Eq. 239, 57 Atl. Rep. 1075, 1076 without opinion.

<sup>89</sup> *Walker v. Seymour*, 13 Mo. 592, 596

renew void for uncertainty. If the covenant to renew is valid the lessee will not be deprived of his right to have it specifically enforced by the refusal of the lessor to select an appraiser or to abide by the result of the appraisal when made or by the neglect or refusal of the appraisers to act or to report. The court of equity will enforce the covenant to renew despite the failure of the appraisers to perform their duty and will then proceed to do it for them by turning the matter over to a master or referee in order to ascertain what will be a fair and reasonable rental under the new lease.<sup>90</sup> In such a case the fixing of the rent by an appraisal is merely a collateral and incidental part of the covenant to renew and not the very essence and substance of it. It is a mere matter of form intended as a measure of convenience to carry out the principal and primary intention of the parties which was to renew the lease. The court will not permit this primary intention to be defeated by the neglect or the failure to act of either of them or *a fortiori* of third persons, to do some incidental act but will substitute itself in the place of the appraisers and will determine the rental for the new term.<sup>91</sup> The fixing of the rental value of the premises by an appraisal is not of the essence of the contract. The right to a renewal contained in the covenant is the essential element which is to be considered by the court and its mode of operation is not very material. The tenant may have gone to considerable expense and inconvenience in erecting improvements on the premises in reliance upon his expectation of a renewal. If this expectation has been justified by the express terms or covenants of the lease he ought not to be disappointed. And as a general rule in construing covenants for renewals where there is any uncertainty the tenant ought to be favored because the landlord having the power to stipulate in his own favor has neglected to do. A distinction also is made between a class of cases in which land has been sold at a price to be fixed by subsequent agreement or appraisal and those cases where rentals are to be appraised on the renewal of leases. In the case of a sale of land the purchase price is an essential element and if this be not fixed and determined the contract of sale is void for

<sup>90</sup> Kaufmann v. Liggett, 209 Pa. 328; Gourlay v. Duke of Somerset, St. 87, 98, 58 Atl. Rep. 129; Hopkins v. Gilman, 22 Wis. 476; Gregory v. Mighell, 18 Ves. Jr. 19 Ves. 429.

<sup>91</sup> Viany v. Ferran, 5 Abb. Pr. (N. S. N. Y.) 110.

uncertainty and will not be enforced in any way. But there exists a marked distinction between such a case where no rights have been vested or liabilities sustained and the case of a tenant who has enjoyed possession and made improvements during the term under a reasonable expectation based on the language of the lease that he would have a renewed term in which to enjoy them.<sup>92</sup>

**§ 815. The covenant to renew runs with the land.** The right of a lessee under a covenant to renew his lease at its expiration is a substantial and important part of the term itself; and, as it relates to the premises themselves, it is transferred with the term by an assignment of the lessee's interest and as incident thereof. In other words the covenant to renew is said to run with the land and may operate in favor of the assignee, mortgagee or pledgee of the lessee though the word assigns is not mentioned in it.<sup>93</sup> The assignee may therefore enforce the covenant against the lessor or he may enforce it against a grantee of the lessor.<sup>94</sup> Where the consent of the lessor is required by the lease to be given in writing to an assignment by the lessee, and the lessor waives a failure on the part of the lessee to obtain his consent in writing, both he and his grantees are thereafter bound to renew the lease<sup>95</sup> where the original lessee had an option to renew.<sup>96</sup>

<sup>92</sup> Kaufman v. Liggett, 209 Pa. St. 87, 58 Atl. Rep. 129.

Kinson v. Pettit, 47 Barb. (N. Y.) 230, 234; Downing v. Jones, 11 Daly (N. Y.) 245; Betts v. June, 51 N. Y. 274; Crook v. Crook, 20 Abb. N. C. 249; Kolasky v. Michels, 120 N. Y. 635, 24 N. E. Rep. 278; Robinson v. Beard, 140 N. Y. 107, 35 N. E. Rep. 441; Instead v. Stonely, 1 and 82; Roe v. Hayley, 12 East. 464, 469; Hyde v. Skinner, 2 P. W. 197; *contra* Sutherland v. Goodnow, 108 Ill. 528, 48 Am. Dec. 560; North Chicago S. R. Co. v. Le Grand Co., 95 Ill. App. 435.

<sup>93</sup> Leppla v. Mackey, 31 Minn. 75, 76, 15 N. W. Rep. 470; Rowe d. Banford v. Hayley, 12 East 464, 468, 11 R. R. 455.

<sup>94</sup> Barclay v. Steamship Co., 6 Phila. (Pa.) 558.

Paige Ch. (N. Y.) 412, 414; Wil-

Inasmuch as the covenant to renew runs with the land, the lessee having an option, may enforce it against the heirs of the lessor. After the death of the lessor, a lessee having a right to a renewal, is entitled to have the lease renewed by all persons who have or claim to have an interest in the reversion, and the court will decree that this shall be done, determining thereafter among themselves the respective rights of the parties who claim the reversion.<sup>97</sup> And on the other hand it has been held in defining the rights of the grantee from the lessor of a portion of the premises subject to the rights of a lessee, that as between him and his grantor he has a right to renew the lease as, after such conveyance, the original lessor cannot grant a renewal.<sup>98</sup> If the lessor may on a certain contingency refuse to grant a renewal when it is demanded by the lessee, his grantee may also refuse a renewal on a like contingency. When a covenant to renew a lease has attached to it a clause which permits the covenantor to refuse a renewal if he shall desire to do so the benefit of the clause, which is, in its nature, inseparable from the covenant, ensues to the grantee of the covenantor. The covenant to renew runs with the land but the grantee takes it as a whole. Thus where a lessor had covenanted to grant a renewal unless he wished to use the land for building purposes, his grantee has the right to refuse a renewal if he desires to use the land for such purposes. The right of using the land for his own purposes expressly reserved in the lease which would necessarily involve a refusal of a renewal is not personal to the covenantor so that it perishes with his death or transfer of title but it passes with the land to the succeeding owner who may refuse a renewal if he wishes to use the ground for building purposes.<sup>99</sup>

**§ 815a. The tenant's equitable right to a renewal.**  
Though the tenant is given no absolute right to a renewal by the

<sup>96</sup> An option to renew a lease gives to the members of a partnership who were the tenants, passed by the assignment of one member of the partnership of his interest to the other members. The latter providing he has complied with all the conditions of the lease may exercise the option. Barbee v. Greenberg, 57 S. E. Rep. 125.

<sup>97</sup> Bratt v. Wooston, 74 Md. 609,

<sup>98</sup> Norton v. Snyder, 2 Hun (N. Y.) 82, 4 Hun (N. Y.) 330. A covenant to renew at the request of the lessee binds the lessor to renew at the request of the lessee's executors. Hyde v. Skinner, 2 P. Wms. 196.

<sup>99</sup> Leppla v. Mackey, 31 Minn. 75, 76, 16 N. W. Rep. 470.

express terms of the lease, he has, under ordinary circumstances, where there is no express provision in the lease to the contrary, what may be called a reasonable expectation of procuring a renewal by an agreement with his landlord. This expectation though unenforceable in law; and hence valueless in law may be regarded in equity as conferring an equitable right upon him which has more or less value according to the circumstances. It gives him no legal remedy against his landlord. But if some one who occupies a trust relationship to the tenant by reason of this trust position, and the knowledge which he thus acquires secures a renewal to himself of the lease, he will be treated in equity as a trustee for the tenant and the renewal and all rights, legal or equitable, which he has secured under it, will be the property of the tenant. Equity will treat him as holding the lease in trust for the tenant.<sup>1</sup> A mortgagee or pledgee of a lease which is renewable at the option of the lessee may seek the protection of equity in a case where the lessee and the lessor conspire to deprive him of the benefit of a renewal clause. For the privilege of a renewal may be the most valuable part of the leasehold interest and it may have prompted the mortgagee to advance his money upon the security of the lease. If the lessee in mortgaging or pledging the lease has also agreed that he will assign any renewal of it which he may have in the future he may be compelled to do so by an action for specific performance. If, to defraud the pledgee, the lessor acting with the consent of the lessee, shall renew the lease to another person, equity will regard the new tenant as a trustee for the benefit of the mortgagee. If the mortgagee discovers that the lessor is about to renew the lease to a third party to the prejudice of his rights to have the renewal assigned to him, he may restrain the making of a new lease to such third party by an injunction.<sup>2</sup>

**§ 816. The right of the personal representative of the lessee to a renewal.** An option to renew the lease conferred upon the lessee is not destroyed or annulled by his death, but may be exercised by his personal representatives.<sup>3</sup> This was held in the case of an option to renew contained in a covenant by the

<sup>1</sup> McCourt v. Singers-Bigger, 76 C. C. A. 73, 145 Fed. Rep. 103; Singers-Bigger v. McCourt, 76 C. A. 73, 145 Fed. Rep. 103.

<sup>2</sup> H. Koehler & Co. v. Kennedy, 72 N. Y. Supp. 595. <sup>3</sup> Kolasky v. Michels, 120 N. Y. 635, 24 N. E. Rep. 278, 2 Sil. (N.

lessor "that the party of the second part" shall have the privilege and option to a renewal of the lease.\* Hence it is apparent that the option survives, the death of the lessee though his personal representative is not named in it. Whether the exercise of the option by the personal representative shall bind the estate of the deceased, or whether he shall be individually liable, is another question. It has been held that an executor of a lessee cannot bind the estate of his testator to a renewal of a lease in which his testator was the lessee, and which permitted renewals at the option of the lessee. The executor's renewal of the lease renders him liable personally under the well settled rule that executors and similar *quasi* trustees cannot by their executory contracts, though they are made in the interest of, and for the benefit of the estate, if made upon a new and independent consideration, bind the estate and create a liability which is not founded upon a contract of the testator or person whom they represent.<sup>5</sup> A court of equity may compel the lessee's executors to execute a renewal lease where they had entered on his estate, and had admitted assets; though the executors shall accept a renewed lease, the court will not compel them to become personally liable thereon. They will be only liable so far as they have assets, and only upon such

Y.) 581; affirming, 46 Hun, 677, 11 N. Y. St. Rep. 357.

\* *Kolasky v. Michels*, 120 N. Y. 635, 24 N. E. Rep. 278, 2 Sil. (N. Y.) 581; affirming 46 Hun, 677.

<sup>5</sup> *Chisolm v. Toplitz*, 82 App. Div. 346, 347, 82 N. Y. Supp. 1081. As between the executor of the lessee and the lessor the latter may rely upon the lease. The beneficiaries however are not bound by the lease. The propriety of the lease and the liability of the estate are to be determined by the surrogate's court on the accounting of the executor. The defendant insists that his case comes within an exception to the general rule as it is based on a lease made by the testator in his life time. The renewal by the personal representative is based upon the lease only to the

extent that the lease afforded an opportunity to make the renewal. It does not create any obligation on the lessee to renew. If the option to renew were in the lessor and not in the lessee so that the executor of a deceased lessee were obliged to renew the lease a very different situation would be presented. Nor can the fact that if the personal representative had not renewed the buildings would have been forfeited be material as that is a question which cannot be litigated in an action against the personal representative in his individual capacity for in such an action the beneficiaries who are vitally interested have not standing. *Chisolm v. Toplitz*, 82 App. Div. 346, 347, 82 N. Y. Supp. 1081.

covenants as their testator would have entered thereon had he then been alive.<sup>6</sup> On the other hand a trustee appointed by the will of the lessor, cannot be compelled in equity in renewing a lease which was part of the estate to enter into a covenant to renew it where he takes no beneficial interest, as he has no authority to enter into any covenant as trustee except that he has done no act to encumber the property.<sup>7</sup>

**§ 817. The exclusive option in the landlord to renew the lease.** Usually it is the tenant who has the option of a renewal which the landlord is compelled to recognize and acquiesce in, provided the tenant elects to take a renewal and also, provided he exercises his election according to the terms and limitations contained in the lease. It is lawful, however, to give the landlord a right to compel the tenant to take a new lease or an extension of the old one. Thus a provision that the landlord will renew or, in the alternative, will pay to the tenant at the termination of the lease the value of the improvements which the tenant has erected upon the premises is a common one and, in effect, gives the landlord an option to renew or to refuse a renewal, as he may elect. Thus, where a lease recited that the tenant could renew at the end of the term, but that if the landlord was unable or refused to give a renewal or extension, then he should pay the tenant for his improvements the tenant has no option to renew without the consent of the landlord, and the latter may refuse to renew but he must then pay the tenant the value of the improvements which the latter has placed upon the premises.<sup>8</sup> Another case where the option to renew the lease is exclusively in the landlord occurs where he agrees to renew unless in the meantime he shall sell the premises. His sale of the premises is then an election not to renew, and the tenant, where the property is sold during the term, cannot of course compel the purchaser to renew though ordinarily a covenant to renew a lease runs with the land. The sale however must be a *bona fide* sale or conveyance of the property, not a mere cover for an attempt to avoid the performance by the landlord of his obligation to renew. It must usually be a voluntary sale by the landlord and it is very doubtful if a

<sup>6</sup> Phillips v. Everard, 5 Sim. 102;      <sup>7</sup> Worley v. Frampton, 5 Hare. Stephens v. Hotham, 1 Kay & J. 560, 16 L. J. Ch. 102, 10 Jur. 1092. 571, 24 L. J. Ch. 665, 1 Jur. (N.      <sup>8</sup> Neiderstein v. Cusick, 81 N. Y. S.) 842, 3 Sq. R. 571, 3 W. R. 340.      Supp. 105&

sale *in invitum* as by the foreclosure of a mortgage, or by the sheriff under a judgment or decree would be within the terms of the lease. Not only must the sale be *bona fide*, but it must be open and with the knowledge of the tenant, or the circumstances must be such that he can obtain knowledge if he desires to do so. A provision that the tenant shall have the privilege of a renewal provided the landlord does not sell the premises, means an open and notorious sale that shall be brought to the tenant's knowledge. Until such a sale takes place, he has the right to deal with his landlord, who is the apparent owner as though he were the real owner, so that a grantee in a secret conveyance will be bound by the acts of the grantor, until he informs the tenant of the sale.<sup>9</sup> But where a lessor covenants to renew if he shall not have previously disposed of the premises, a *bona fide* conveyance by way of advancement to a child of the lessor is a disposal of them.<sup>10</sup> In construing covenants to renew, the courts will as a general rule at least where there is any vagueness and uncertainty in the language favor the tenant and not the landlord. If the intention to renew be not expressly stated it may be implied under some circumstances from a consideration of the language of the lease in connection with the facts of the case that the tenant was to have an option to renew. This inclination to presume or to imply the privilege in a tenant to renew is based partly upon the

<sup>9</sup> Starkey v. Horton, 65 Mich. 96.

<sup>10</sup> Elston v. Schilling, 42 N. Y. 79, 6 Rob. (N. Y.) 544. And the court also said that even the fact that the lessor gave the premises to his son to avoid renewing the lease was not material. In Starkey v. Horton, 65 Mich. 96 on p. 103 the Court said, "The sale meant by such lease was evidently an open and notorious sale,—one that should be brought home to the defendant (Tenant). Such must have been the intention of the parties when the lease was executed; and the policy of the law which is to promote justice and do equity will not allow a secret bargain and sale, under such a lease, to take from the les-

see the profits or the avails of his labor, earned in good faith under the option in such lease, and in entire ignorance of such secret sale, and without notice, either actual or constructive, that the lessor had parted with his title. And until he has such notice he is entitled to deal with the lessor, the apparent owner of the title, the same as if he were the actual owner; and the grantee in the secret conveyance will be bound by the acts and declarations of his grantor until he takes some steps to disabuse the mind of the lessee of the idea which he rightfully holds that the place has not been sold."

common law rule that every man's grant is to be taken most strongly against him and partly upon the fact, that inasmuch as the landlord has the power of stipulating in his own favor, his action in inserting in the lease any provision permitting or suggesting an option to renew is a clear indication that a renewal was in his mind when he executed the lease and that he meant to confer upon the tenant a right or option to claim one.<sup>11</sup> A covenant by the landlord that he will at the end of the term renew the lease, or sell the premises to the tenant at its market value confers the choice upon the tenant and not upon the landlord.<sup>12</sup> In other words the tenant may either renew his term or buy the land at the market value but the landlord cannot compel him to buy if he refuses to do so and elects to renew.

**§ 818. Option of renewing lease or paying for tenant's improvements.** The lease may expressly provide that the landlord may elect to pay the tenant for his improvements which he has erected upon the premises during the term either a stipulated sum or such sum as shall be fixed by an appraisal or in the alternative he may give the tenant a renewal of the lease. A lease which confers upon the tenant the right to compel the landlord either to pay for his improvements or to give him a renewal at the end of the term permits the tenant to retain possession of the premises until he has either received compensation for his improvements and fixtures or until he has received an express renewal. If, under such a covenant, he shall with the consent or acquiescence of the landlord, retain possession after his term has expired, and particularly if he shall pay the rent to the landlord, a renewal of the lease will be presumed. But where there is no provision in the lease giving the tenant the option of a renewal and permitting him to retain possession until he is paid for his fixtures, the landlord has an absolute right to possession at the termination of the lease and the remedy of the tenant is an action at law for the value of his improvements.<sup>13</sup> A lease for twenty-one years, containing a covenant on the part of the lessor either to renew or to pay for all buildings built on the land by the les-

<sup>11</sup> Kaufmann v. Liggett, 209 Pa. St. 97, 58 Atl. Rep. 129.

<sup>12</sup> Bamman v. Binzen, 142 N. Y. 636, 60 N. Y. St. R. 865; affirming

without opinion 65 Hun. 39, 47 N. Y. St. Rp. 67.

<sup>13</sup> Van Rensselaer Heirs v. Penniman, 6 Wend. (N. Y.) 569; Tallman v. Coffin, 4 N. Y. 134.

see, where the lease is renewed to the assignee of the lessee on the same terms, binds the lessor if he declines to renew for a third term of years to pay for buildings erected during the original term.<sup>14</sup>

**§ 819. A renewal by an endorsement on the lease.** An endorsement in writing upon a written lease, which is signed by the lessor or his agent and which is accepted and acted upon by the lessee, may be either a renewal or an extension of the lease on which is endorsed or it may be an entirely new lease. An endorsement to the effect that this lease is to be extended without altering its terms, or upon the same terms as the lease, is merely an extension of an existing lease and creates a hiring which is upon precisely the same terms as those which were mentioned in the lease. But an indorsement which mentions a new consideration and makes entirely new terms by which the lessee is to receive more property for his occupancy, and the lessor, to acquire a right to retain the lessee's improvements at the end of the term, is a new lease and not an extension of the old lease, though the endorsement in express language purports to be an extension. The endorsement supercedes and cancels the old lease and makes a new one and will not by implication incorporate within itself any of the covenants in the former instrument.<sup>15</sup> Being a new lease it must comply in its form and other requisites with the provisions of the Statute of Frauds and must also be based upon a new consideration. The binding character of a written renewal endorsed on the original lease by a lessor, or of an extension signed thereon, is not affected by the fact that the extension was not endorsed upon a duplicate lease in the possession of the lessee, either as against the lessor or his grantee,<sup>16</sup> particularly if the lessee has continued in possession thereunder and paid rent to the lessor.

<sup>14</sup> Wray v. Rhinelander, 52 Barb. (N. Y.) 553, 39 How. Pr. (N. Y.) 299.

<sup>15</sup> Walsh v. Martin, 69 Mich. 2935, 37 N. W. Rep. 40, as to renewal of lease by endorsement,

see Brand v. Trumveller, 32 Mich. 215.

<sup>16</sup> Pittsburg Mfg. Co. v. Fidelity Title & Trust Co., 207 Pa. St. 223, 56 Atl. Rep. 436.

## CHAPTER XXXIII.

### THE LIEN OF THE LANDLORD FOR RENT AND ADVANCES.

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**§ 820. General rules as to landlord's liens by statute.**

In the absence of statute or an express contract and aside from the lien of a distress at the common law, the landlord has no lien for rent or for his advances or to secure other indebtedness which may be due him by his tenant.<sup>1</sup> A landlord has no equitable lien for rent upon property taken on a distress and replevied by the tenant.<sup>2</sup> As to the constitutionality of liens created by statute for the benefit of landlords for rent due them and advances made by them, there can be no doubt. A statute giving a landlord a lien for one year's rent, whether it has or has not become due, on the tenant's goods which are on the premises, which is over all other liens created after said goods are on the premises,

<sup>1</sup> *Walters v. Myer*, 39 Ark. 560, 567; *Hitchcock v. Hassett*, 71 Cal. 331, 333, 12 Pac. Rep. 228; *Johnson v. Emanuel*, 50 Ga. 590; *Herron v. Gill*, 112 Ill. 247; *Powell v. Daily*, 61 Ill. App. 552, affirmed in 163 Ill. 646, 45 N. E. Rep. 414; *Merritt v. Fisher*, 19 Iowa, 354; *Clark v. Haynes*, 57 Iowa 96, 10 N. W. Rep. 292; *Arnold v. Phillips*, 59 Ill. App. 213; *A. W. Kellogg Newspaper Co. v. Peterson*, 162 Ill. 158, 44 N. E. Rep. 411, 53 Am. St. Rep. 300, affirming 59 Ill. App. 89; *Gelston v. Rullman*, 15 Md. 260, 268; *Marye v. Dyche*, 42 Miss. 347; *Stamps v. Gilman*, 43 Miss. 456; *Smith v. Hart*, 68 N. Y. Supp. 1127, 34 Misc. Rep. 214; *Snell v. Ricketts*, 28 Neb. 616, 619, 44 N. W. Rep. 729; *Howland v. Forlaw*,

108 N. Car. 567, 570, 13 S. E. Rep. 173; *Hughes v. Whitaker*, 4 Heisk. (Tenn.) 399, 402; *Templeman v. Gresham*, 61 Tex. 50; *Loomis v. Lincoln*, 24 Vt. 153, 154.

<sup>2</sup> *Gelston v. Rullman*, 15 Md. 260, 268. Even where the landlord has no right to distrain for rent it does not necessarily follow that he has therefore a lien for rent. *Howland v. Forlaw*, 108 N. Car. 567, 570, 13 S. E. Rep. 173. A lien by parol for rent due under a written lease is invalid. *Hughes v. Whitaker*, 4 Heisk. (Tenn.) 399, 402. In the absence of a contract to that effect a landlord who is to receive a part of his rent in a share of the crop has no lien on the crop. *Loomis v. Lincoln*, 24 Vt. 153, 154.

is constitutional.<sup>3</sup> In most cases this has been assumed and, as the question has been seldom raised, we are without very much authority from the courts on this particular question. The power of the legislature to give one class of creditors a preference over others is generally admitted and the only point that is open for judicial determination is the mode of the exercise of this power when it is delegated to the courts. The tendency of the statutes creating landlord's liens has been to ameliorate the harsh features of the common law distress so far as the tenant is concerned. A statute which provides that a lien for advances by the landlord may be enforced by a seizure of the property without a notice to the tenant, is not unconstitutional because the property of the tenant is thereby taken without due process of law. To permit a judgment to be taken against a person by *ex parte* proceedings without any sort of notice would certainly be objectionable upon that ground. The object of notice to the person against whom a claim is made is that he may have an opportunity to defend his rights and any sort of notice which gives him such an opportunity is sufficient. The statute giving the lien and permitting a seizure without prior notice is presumed to be familiar to the tenant when he executes the lease. And, inasmuch as the property which is seized under the lien is usually in the possession either of the tenant or of his agent or assignee, it is unquestioned that a seizure of it will notify the tenant not only that it has been taken into the custody of the court, but also that he must take the proper steps in the proceedings begun by the seizure to prevent the sale if he can. Indeed, at common law the landlord might always distrain for rent without prior notice and under existing statutory and constitutional provisions, the tenant is in no worse position than he was at the common law. The warrant of seizure is at once notice and due process of law within all the constitutional requirements,<sup>4</sup> and the tenant may interpose any defense he may have in the action. Statutes creating liens in favor of landlords being in derogation of the common law are strictly construed. The landlord must show affirmatively that his case is within the statute under which he claims a lien.<sup>5</sup> A stat-

<sup>3</sup> *Anderson v. Henry*, 46 W. Va. 319, 31 S. E. Rep. 998; *In re McIntire*, 142 Fed. Rep. 593, 595.

<sup>4</sup> *Blanchard v. Raines*, 20 Fla. 467, 476, 477; citing *Pennoyer v.*

*Neff*, 95 U. S. 714, 727, followed in *Jones v. Fox*, 23 Fla. 454, 461, 2 So. Rep. 700.

<sup>5</sup> *Hoopes v. Brier*, (Ariz. 1906) 80 Pac. Rep. 327; *Beck v. Wisely*,

ute giving a lien for rent will not be construed so as to create, by implication, a lien for advancements made or for supplies furnished. Nor will a lien for advancements or supplies to make or save a crop cover rent which becomes due and remains unpaid. As a general proposition no writing by the parties is necessary as notice to confirm a lien given by a statute, nor is the filing or recording of the written lease necessary in case of such a lien.<sup>6</sup> The statute creating a lien being the law of the state is by implication a part of every oral or written contract of lease made in the state. It is presumed that the parties know what the law is and that they executed the lease having the existence of the statutory lien in their minds. They may, if they so desire, create a lien of a different character and extent, by express contract; but, in the absence of such a contract, the statutory lien will apply. The existence of a lien by contract does not necessarily destroy the statutory lien. But the benefit of the latter may be waived by an express provision in the lease. In some cases the landlord's common law remedy by distress has been expressly abrogated by the statute creating a lien for rent. Where this is not the case and where the remedy by distress has not been abolished by some express statute, or by the general policy of the jurisdiction in which the lease is made, the two remedies by statutory lien and by distress at common law are concurrent. The landlord may, under such circumstances, avail himself of either remedy.<sup>7</sup>

**§ 821. When the relationship of landlord and tenant must be proved.** In order that a landlord's lien may be created there must be the relationship of landlord and tenant between the parties,<sup>8</sup> though it is immaterial how the relation has been created.<sup>9</sup> The lien is exclusively for the benefit of the land-

52 Mo. App. 242, 243; *Knox v. Hunt*, 18 Mo. 243; *Phillips v. Douglass*, 53 Miss. 175; *Weed v. Standley*, 12 Fla. 166. It has been held that statutes conferring upon the landlord a lien for rent are constitutional. *State v. Elmore*, 68 S. C. 140, 46 S. E. Rep. 939.

<sup>6</sup> *Scully v. Porter*, 57 Kan. 322, 46 Pac. Rep. 322.

<sup>7</sup> A statute creating a lien for "rent agreed to be paid" is not confined to an express covenant

to pay rent, but includes an implied contract to pay it as well. *Love v. Law*, 57 Miss. 596.

<sup>8</sup> *Hancock v. Boggus*, 111 Ga. 884, 36 S. E. Rep. 970; *Saterfield v. Moore*, 110 Ga. 514, 35 S. E. Rep. 638; *Fisk v. Morris*, 11 Rob. (La.) 279; *Smith v. Maberry*, 61 Ark. 515, 520, 33 S. W. Rep. 1068.

<sup>9</sup> *Powell v. Hadden's Exrs.*, 21 Ala. 745. Under a statute giving a landlord a lien for rent and advances on property of his tenant,

lord or his assignee. A mortgagee giving notice to the tenant that he claims future rents cannot enforce it.<sup>10</sup> A vendor may, on the vendee's default, enforce the landlord's lien where the vendee went into possession of the premises agreeing to pay rent if he did not pay the purchase money,<sup>11</sup> or, after a default by the vendee, a lease may be executed between the vendee and the vendor, to which a lien for rent will attach in favor of the vendor who has become the landlord.<sup>12</sup> But a landlord's lien cannot be enforced as such by a vendor against a vendee in possession where the relation of landlord and tenant never existed though the installments of purchase money he is to pay are called rent.<sup>13</sup> A statute providing that all claims for rent shall be liens on crops on the land, gives a lien to all landlords whether of farm lands, stores or residences.<sup>14</sup>

**§ 822. A lien for rent created by the lease.** It is competent for the parties to a lease to provide in the lease that the landlord shall enjoy a lien for his rent, due or to become due at any time during the term upon any personal property of the tenant. Inasmuch as a lease containing such a lien is in its nature and effect merely a chattel mortgage, it may be made to cover and include any personal property which may be mortgaged. These contractual liens ought to be framed in express language. There is usually a presumption against creating such liens by inference and implication or from uncertain or dubious words. Thus a provision that a landlord shall receive as rent a certain specified number of bushels of grain for each acre which is planted by the tenant does not give the landlord a lien on the tenant's corn crop at least where it is not also provided that the rent payable in corn shall be paid out of corn to be raised by the tenant on the land.<sup>15</sup> The same construction would be applicable in respect to third persons to an express provision that a tenant shall not remove any

it must affirmatively appear that the relation of landlord and tenant existed between the parties. *Saterfield v. Moore*, 110 Ga. 514, 516, 35 S. E. Rep. 638.

<sup>10</sup> *Drakford v. Turk*, 75 Ala. 339, 340.

<sup>11</sup> *Bacon v. Howell*, 60 Miss. 362.

<sup>12</sup> *Jones v. Jones*, 117 N. Car. 254, 257, 23 S. E. Rep. 214.

<sup>13</sup> *Walters v. Myer*, 39 Ark. 560, 567.

<sup>14</sup> *Jones v. Fox*, 23 Fla. 454, 460; 2 So. Rep. 700.

<sup>15</sup> *Snell v. Ricketts*, 28 Neb. 616, 44 N. W. Rep. 729, holding also that the landlord cannot maintain a replevin.

grain, hay or other crop from a farm for sale, though the tenant might be liable in damages to the landlord.<sup>16</sup> Nor is any lien upon the tenant's growing crops created by an oral agreement that the title thereto shall remain in the landlord during the term, and that after the crops are sold the landlord shall retain the amount of the rent due him out of the proceeds of the sale and shall turn over the balance to the tenant. After the crops are harvested and stored they will be regarded merely as pledged to secure the payment of the rent. There is, therefore, under such circumstances, no lien in favor of the landlord upon the crops while they are un-reaped which will support an action for their conversion against an officer who levies an execution or attachment upon them.<sup>17</sup> So, also, a landlord acquires no lien on a tenant's crops as against creditors of or purchasers from him by a clause in the lease to the effect that the landlord shall have and control the crops and may sell and dispose of them until the rent is paid, unless it shall appear that the crops, after being harvested have been actually delivered into the possession of the landlord by the tenant.<sup>18</sup> A clause in a lease creating a lien for rent or for other indebtedness on future crops in favor of the landlord is unquestionably valid.<sup>19</sup> A clause in a lease or a separate instrument giving the landlord a lien on crops or personal property of the tenant for rent or for advances to the tenant or for any other indebtedness to the landlord, is in its nature and effect an equitable mortgage of a chattel.<sup>20</sup> The rules of law applicable to the execution, filing, recording

<sup>16</sup> Marshall v. Linz, 115 Cal. 622, 47 Pac. Rep. 597.

<sup>17</sup> Stockton Savings & Loan Soc. v. Purvis, 112 Cal. 236, 42 Pac. Rep. 441, 447.

<sup>18</sup> Lemon v. Wolff, 121 Cal. 272, 53 Pac. Rep. 801, 802.

<sup>19</sup> Smith v. Taber, 46 Hun (N. Y.) 313, 315, 14 N. Y. St. Rep. 644; Reynolds v. Ellis, 103 N. Y. 122; McCaffrey v. Woodin, 65 N. Y. 459; Stockton Savings & Loan Soc. v. Purvis, (Cal. 1895) 42 Pac. Rep. 441, 442; Streeter v. Ward, 12 N. Y. St. Rep. 333; Brainard v. Burton, 5 Vt. 97; Smith v. Atkins, 18 Vt. 461; Wy-

att v. Turner, 37 Ga. 640, 642. See, also, as to the validity of chattel mortgages on future crops, Arques v. Wasson, 51 Cal. 620; Tapia v. Demartini, 77 Cal. 383, 19 Pac. Rep. 641; Doyly v. Capp, 99 Cal. 153, 33 Pac. Rep. 736; Lemon v. Wolf, 121 Cal. 272, 53 Pac. Rep. 801, 802.

<sup>20</sup> Mitchell v. Badgett, 33 Ark. 387, 395; First National Bank of Joliet v. Adam, 34 Ill. App. 159; Sioux Valley State Bank v. Honnold, 85 Iowa, 352, 52 N. W. Rep. 244; Whiting v. Eichelberger, 16 Iowa 422; Merrill v. Ressler, 37 Minn. 82, 86, 33 N. W. Rep. 117,

construction and enforcement of chattel mortgages are therefore applicable to leases conferring a lien on the tenant's property. In order that the lien created by a lease shall be binding on subsequent purchasers or incumbrancers, the lease must be filed as a chattel mortgage in strict conformity with the statutes.<sup>21</sup> The filing of the lease containing the lien as a chattel mortgage is constructive notice of the lien to a subsequent purchaser of a crop.<sup>22</sup> A landlord may have his statutory lien and a contract lien created by the lease at the same time. There is no presumption of a merger of the statutory lien in the contract lien. This must appear to be the intention of the parties. So a clause in a lease giving the lessor a lien on all property of the lessee on the premises exempt from execution is cumulative and does not waive the statutory lien.<sup>23</sup>

**§ 823. The construction of liens created by the lease.** A lease containing a provision for a lien for rent gives no lien where it is not signed by the lessor.<sup>24</sup> The description of the property comprised in a lien created by a stipulation in a lease must be definite and certain. It must be so specific as to give fair notice to all third persons who deal with the tenant's property what particular property is affected by the lien. The rule applicable to descriptions in chattel mortgages applies to the description of property subject to a lien, because for all purposes of interpretation and construction a lien created by the lease in express language will be considered by the courts a chattel mortgage.<sup>25</sup> The

5 Am. St. Rep. 822; *Burgess v. Kattleman*, 41 Mo. 480; *Wright v. Bircher's Exr.*, 72 Mo. 179, 37 Am. Rep. 433, affirming 5 Mo. App. 433; *Smith v. Taber*, 46 Hun 313, 315; *Johnson v. Crofoot*, 53 Barb. (N. Y.) 574, 577, 37 How. Prac. (N. Y.) 59; *McCaffrey v. Woodin*, 65 N. Y. 459, 461; 22 Am. Rep. 644; *Reynolds v. Ellis*, 103 N. Y. 115, 8 N. E. Rep. 892, 34 Hun (N. Y.) 47, 49; *Greeley v. Winsor*, 1 S. D. 117, 45 N. W. Rep. 325, 36 Am. St. Rep. 720; *Esshom v. Hotel Co.* 7 S. D. 74, 63 N. W. Rep. 229.

<sup>21</sup> *Johnson v. Crofoot*, 53 Barb. (N. Y.) 574, 577, 37 How. Prac.

(N. Y.) 59; *Stockton Savings & Loan Soc. v. Purvis*, (Cal. 1895) 42 Pac. Rep. 441, 442; *Smith v. Dayton*, 94 Iowa 102, 62 N. W. Rep. 650.

<sup>22</sup> *Smith v. Taber*, 46 Hun (N. Y.) 313, 316.

<sup>23</sup> *Smith v. Dayton*, 94 Iowa, 102, 62 N. W. Rep. 650.

<sup>24</sup> *Nicholls v. Barnes*, 32 Neb. 195, 49 N. W. Rep. 342.

<sup>25</sup> *First National Bank of Jellet v. Adam*, 138 Ill. 483, 500, 28 N. E. Rep. 955, 957, reversing 34 Ill. App. 159; *Attaway v. Hoskinson*, 37 Mo. App. 132, 136.

description must be such as will enable third parties aided by inquiries which the instrument itself suggests to identify the property. A specific description in great detail, though it is advisable, does not always enlighten the inquirer. Thus a description so precise as to distinguish the article from all others may be of less value than a more general description if to the latter there be added words of location or of ownership, which will tell the inquirer in what place or in whose possession he will find the property. No matter how precise the designation of the articles by size, number or nature of use or by their location may be, some parol evidence will always be necessary to identify them on the trial of an action to enforce the lien, and some oral inquiry necessary to find them. Hence, the clearness of a description is only a question of degree and the mere fact of a general and loose description will not alone invalidate the lien if there is enough in the lease to enable one to identify the property subject to a lien on a reasonable search and by reasonable effort.<sup>26</sup> The scope of a lien created by the agreement of the parties is determined by the exact language used by them. So an express lien in a lease for rent on butter made and grain raised on the farm covers hay made from grass grown on the farm.<sup>27</sup> Usually a description of property which is subject to a lien by the terms of the lease will not be extended. The construction is usually restrictive rather than expansive. A lien created by the lease upon "all goods, chattels and other property" of the tenant will not cover buildings of the tenant erected by him on the premises. The meaning of "other property" is best understood by referring back to goods and chattels, and thus it apparently means other property of the same sort. The rule here invoked is that general words, associated with specific words, take their meaning from the latter. And hence if "other property" means personal chattels, it will not include fixtures or chattels real which assimilate to the realty. The fact that a common law distress is confined to personal chattels may also, by analogy, indicate that the parties meant to limit

<sup>26</sup> *Marquam v. Sengfelder*, 24 Oreg. 2, 12, 32 Pac. Rep. 676; *Lawrence v. Edwards*, 7 Ohio St. 194; see *Harding v. Coburn*, 12 Met. (Mass.) 333, 46 Am. Dec. 680,

which was a case construing a chattel mortgage.

<sup>27</sup> *Briggs v. Austin*, 129 N. Y. 208, 41 N. Y. St. Rep. 378, 29 N. E. Rep. 4, affirming 14 N. Y. Supp. 944.

their contract lien to such property.<sup>28</sup> A stipulation in a lease giving a lien upon any and all buildings and improvements put upon the premises gives no lien on the tenant's furniture,<sup>29</sup> nor upon machinery which was placed in the premises by the tenant,<sup>30</sup> who has a right to remove the same on the expiration of his term. A stipulation that a tenant may remove all fixtures placed by him upon the premises during the term, provided he has kept all his covenants in the lease, gives the landlord, by implication, a valid lien on ordinary trade fixtures but not on furniture, though it be fitted to the premises, provided it is not attached to the freehold. The lien will be limited to fixtures properly so-called.<sup>31</sup> A stipulation in a lease of a hotel which was unfinished when the lease was signed that the landlord was to have a lien for rent on all fixtures, furniture and improvements which were to be put in by the tenant, is valid in equity at least, though the hotel was unfurnished when the lease was signed, and the tenant was to enter in the future. The lien takes effect as soon as the furniture and other articles are put in, secures the whole rent and every installment, and has priority over a chattel mortgage which was given by the tenant after his entry but before any rent became due to a person having knowledge of the stipulation in the lease creating a lien.<sup>32</sup> A provision in a lease that if a tenant shall sell or remove from the premises personal property upon which the landlord has a lien, so as to endanger the lien, the land-

<sup>28</sup> First National Bank v. Adam, 138 Ill. 483, 500, 501; 28 N. E. Rep. 955, 957, reversing 34 Ill. App. 159, also holding that if this construction is not the true one the language was too indefinite as a description of after acquired property to charge third persons with notice. A lease providing for a lien on all buildings and improvements on said premises or which may at any time be placed thereon may be enforced against improvements placed on the land by the tenant after the execution of the lease. Webster v. Nichols, 104 Ill. 160.

<sup>29</sup> Willard v. World's Fair Encampment Co., 59 Ill. App. 336.

<sup>30</sup> Booth v. Oliver, 67 Mich. 664, 668, 35 N. W. Rep. 793, 795.

<sup>31</sup> *Ex parte* Morrow, 17 Fed. Cases No. 9850, 1 Low. 386, 2 N. B. R. 665.

<sup>32</sup> Wright v. Bircher's Exr. 72 Mo. 179, 37 Am. Rep. 433. A lease which provides that a landlord shall have a lien for his rent upon the "furnishing" of a leased hotel does not in the absence of evidence fixing the meaning of the term "furnishing," affect third persons, because the term is too indefinite to cover any specific property. Attaway v. Hoskinson, 39 Mo. App. 132.

lord may at once foreclose the lien, although rent is not yet due, refers to an absolute sale involving a removal of the property from the premises by the purchaser and not to a chattel mortgage which does not convey the legal title but merely gives the mortgagee a lien upon it,<sup>33</sup> which lien is subordinate to the lien for rent created by the lease. A provision in a lease that the landlord shall have a lien upon "all goods, wares and merchandise now in or hereafter to be put in, on or about" the building, does not impose a lien upon horses, harness and wagons which are subsequently purchased by the tenant and used by him for delivery purposes in connection with the tenant's business but which were kept elsewhere than on the premises and which were never upon the premises except so far as they were hitched in the street in front of the premises.<sup>34</sup> A lien in a lease on "all goods, wares, merchandise, household furniture, fixtures and other property which are or shall be placed in or on said premises by the tenants," does not cover the dwelling house upon the premises.<sup>35</sup>

**§ 824. When the lien first attaches.** A lien for rent created in terms by the lease upon crops which are to be grown by the tenant upon the land attaches to the crops at any time after they are in the ground at once as soon as the rent falls due, in the absence of an express stipulation to the contrary. Under a provision in a lease that a landlord is to have a lien for rent on property which may thereafter be brought upon the demised premises as security for rent, the lien attaches as soon as the property is brought upon the premises whether the rent is then due or not.<sup>36</sup> An agreement by a tenant that advances to him by the landlord shall be paid out of the tenant's crops, creates a lien as soon only as the

<sup>33</sup> *Hill v. Coats*, 109 Ill. App. 266, 268, 269.

<sup>34</sup> *Van Patten v. Leonard*, 55 Iowa 520, 8 N. W. Rep. 334, 337. A provision in a lease that the lessees may on paying all the rent and taxes remove certain structures which have been erected by them upon the premises with the permission of the landlord, but that otherwise the structures should be a part of the realty, creates a lien upon such structures in favor of the land-

lord. This lien is paramount to a chattel mortgage given by the lessees when erecting the improvements of which the lessor knew nothing when he made the lease. *Pendill v. Maas*, 97 Mich. 215, 56 N. W. Rep. 597.

<sup>35</sup> *Kuschell v. Campau*, 49 Mich. 34.

<sup>36</sup> *Wisner v. Ocumpaugh*, 71 N. Y. 113. See, also, under the Alabama statute, *Seisel v. Folmar*, 103 Ala. 491, 15 So. Rep. 850.

crop matures.<sup>37</sup> Usually the statutes creating the landlord's lien expressly prescribe the date of the commencement and duration of the lien. A statutory lien on the tenant's personal property brought upon the premises attaches to each article as soon as it is brought upon the land.<sup>38</sup> The lien for rent by statute on crops, attaches as soon as there is any crop to which it may attach, though the rent is not due.<sup>39</sup>

**§ 825. Necessity for filing or recording.** A lien created by an agreement contained in the lease is not effective as to third persons who have no actual notice of it unless the lease is recorded. The agreement or clause creating a lien is, in theory, regarded in law as a chattel mortgage and usually will, and ought to be, treated as such so far as recording it under a statute is concerned.<sup>41</sup> The burden of showing notice of the lien to the purchaser is upon the landlord.<sup>42</sup> As between the parties to it, the clause creating an express lien for rent is enforceable though the lease has not been recorded as a chattel mortgage.<sup>43</sup>

<sup>37</sup> Horton v. Miller, 84 Ala. 537, 4 So. Rep. 370.

<sup>38</sup> Seisel v. Folmar, 103 Ala. 491, 15 So. Rep. 850; Doane v. Garretson, 24 Iowa 351, 355; Garner v. Cutting, 32 Iowa 547, 550.

<sup>39</sup> Sevier v. Shaw, 50 Ga. 213; Dunlap v. Dunseath, 81 Mo. App. 17. Under a statute creating a lien for rent on chattels brought upon the premises by the tenant the lien is not defeated by any disposition by the tenant of the property after it has been brought upon the premises, which is not in the usual course of business in which the tenant is engaged. Seisel v. Folmar, 103 Ala. 491, 15 So. Rep. 850, 852.

<sup>40</sup> Summerville v. Stockton Milling Co., 142 Cal. 529, 76 Pac. Rep. 243; Sioux Valley State Bank v. Honnold, 85 Iowa 352, 357, 52 N. W. Rep. 244; Johnson v. Tacwean, 23 La. Ann. 453; Lake Superior Ship Canal Ry. & Iron Co. v. McCann, 86 Mich. 106, 48 N. W. Rep.

692; Kendall B. & S. Co. v. Bain, 55 Mo. App. 264; see *contra* Davis v. Days, 42 S. Car. 69, 70, 19 S. E. Rep. 975.

<sup>41</sup> Packard v. Chicago Title & Trust Co., 67 Ill. App. 598; Johnson v. Crofoot, 53 Barb. (N. Y.) 574, 577; Reynolds v. Ellis, 34 Hun (N. Y.) 47, 49; Betsinger v. Schuyler, 46 Hun (N. Y.) 349, 352, 12 N. Y. St. Rep. 377; Greeley v. Winsor, 1 S. D. 117, 45 N. W. Rep. 325, 36 Am. St. Rep. 726. The necessity for recording or filing the lease has been held not to be dispensed with by the fact that one has actual notice of the lien though usually the rule is otherwise. Wm. W. Kendall Boot & Shoe Co. v. Bain, 55 Mo. App. 264.

<sup>42</sup> Brownell v. Tuzman, 68 Ill. App. 67.

<sup>43</sup> Webster v. Nichols, 104 Ill. 160; Davis v. Days, 42 S. Car. 69, 70, 71, 19 S. E. Rep. 975; Lyons v. Tedder, 7 S. Car. 69; under

§ 826. The assignability of a landlord's lien. The authorities are not harmonious upon the question whether the landlord's statutory lien for rent or for advances is personal to the landlord or whether his lien is transferred to his assignee by an assignment of his claim for rent or by his conveyance of the reversion. Unquestionably the landlord's lien, if created by an express provision of the lease, is assignable and passes by an assignment of the lease by the lessor or by his conveyance of the reversion. It has been held, on the one hand, that the statutory lien of the landlord for rent is personal to him and that it does not pass by his assignment of the rent or by his endorsement or assignment of a note given by the tenant for the rent.<sup>44</sup> So a third

Maryland, Act 1729, c. 8 the lien is valid against unsecured creditors at the date of the lease though it is not recorded. The lien of judgments in their favor which were entered after a knowledge of the lien has been brought to them is subordinate to the lien. *Hume v. Riggs*, 12 App. D. C. 355. The lease must be recorded as a chattel mortgage or it is worthless. The recording of the lease as ordered is not notice to parties dealing with the tenant's personal property on the premises. *Booth v. Oliver*, 67 Mich. 664, 669; *Lake Superior etc. Co. v. McCann*, 86 Mich. 106, 111, 48 N. W. Rep. 692. This rule was applied as between a landlord and an assignee for the benefit of the creditors of the tenant. *Reynolds v. Ellis*, 34 Hun (N. Y.) 47, 49. For a case in which record was not required, see *Metcalf v. Fosdick*, 23 Ohio St. 114, 120. The clear tendency of the courts is to regard all rent liens created by statute as chattel mortgages. Of course it matters not that the word mortgage or even the word lien is not used in the lease. The court may presume from the language used that

the tenant meant to give a chattel mortgage though this was very probably far from his intention and following this logic to its ultimate conclusion will apply all the rules of law relating to chattel mortgages, to such liens. It matters not in principle whether the court calls it an equitable or a legal mortgage, for in either case, in their abhorrence of secret liens the courts may hold the lien created by the lease invalid unless it has been recorded. Usually the statute makes no distinction between legal and equitable chattel mortgages as to filing, and one is as much within the mischief the statute is meant to prevent as the other. *Merrill v. Ressler*, 37 Minn. 82, 86.

<sup>44</sup> *Roberts v. Jacks*, 31 Ark. 597, 600, 604, 25 Am. Rep. 584; *Warner v. Rice*, 31 Ark. 344, 346; *Block v. Smith*, 61 Ark. 206, 32 S. W. Rep. 1070; *State v. Elmore*, 68 S. Car. 140, 147, 46 S. E. Rep. 939. In this connection it may be noted that a common law right to distrain does not pass by an assignment of the rent due, which is merely a chose in action. The right to distrain at common law

person to whom, at the request of the landlord, the tenant has given a note for his rent due to the landlord, cannot enforce the lien. Nor can the landlord enforce it. The re-delivery of the note to the landlord, however, renews the lien which was only dormant while the third person had the note and the landlord may then enforce his lien for rent against the crop.<sup>45</sup> On the other hand, it has been held that the landlord's assignment of his lease and of his claim for the rent carries with it and, as an incident thereto, his statutory lien for the rent.<sup>46</sup> In some states the lien is expressly made assignable by the statute.<sup>47</sup> The circumstances under which and the parties to which the assignment may be made are usually determined by the statutes. To what extent the transfer by the landlord to a third party of a note which was given him by the tenant for the rent transfers the lien which the landlord has for the rent to the third person is a question which has been often discussed. Its solution depends wholly on the language of the local statute. In a state where, by a statute, "any person entitled to the rent" may enforce a remedy or lien against a purchaser of the crop, the assignee of a rent note may sue a purchaser of the crop.<sup>48</sup> The same rule is recognized in other states, though the

follows the ownership of the reversion and is lost by an assignment of the reversion. *Saunders v. Moore*, 14 Bush (Ky) 97; *Hutsell v. Deposit Bank of Paris*, 102 Ky. 410; 43 S. W. Rep. 469. A special lien created by the lease for the tenant's advances from his landlord does not pass to the assignee of a note for the rent who receives the note in payment of the purchase price of the land, nor does the assignment authorize the assignee to furnish the tenant with supplies. *Rawls v. Moye*, 98 Ga. 564, 25 S. E. Rep. 582. A lien or an attachment for the rent which is expressly given to the reversioner or his executor by a statute does not pass to an assignee of the rent. *Gross v. Bartley*, 66 Miss. 116, 5 So. Rep. 255.

<sup>45</sup> *Varner v. Rice*, 31 Ark. 344, 346.

<sup>46</sup> *Biggs v. Piper*, 86 Tenn. 589, 8 S. W. Rep. 851; *Taylor v. Nelson*, 54 Miss. 524; *Newman v. Bank of Greenville*, 66 Miss. 323, 5 So. Rep. 753, 757; *Hollingsworth v. Hill*, 69 Miss. 73; 10 So. Rep. 450. See also *Keeley v. Brewing Co.*, 102 Ill. App. 381.

<sup>47</sup> *Leslie v. Hinson*, 83 Ala. 266, 3 So. Rep. 443, 444; *Stephens v. Adams*, 93 Ala. 117, 9 So. Rep. 529; *Ballard v. Mayfield*, 107 Ala. 396, 18 So. Rep. 29; *Benson v. Gottheimer*, 75 Ga. 642; *Mercer v. Cross*, 79 Ga. 432, 5 S. E. Rep. 245; *Coker v. Britt*, 78 Miss. 583, 29 So. Rep. 833.

<sup>48</sup> *Biggs v. Piper*, 86 Tenn. 589, 591, 8 S. W. Rep. 851.

statutes are not so explicit. So an administrator of an assignee of a rent note may distrain on the note under the Mississippi statute.<sup>49</sup> And an assignment by the landlord of a note for rent to secure a third person for advances made by the latter to the tenant, carries with it the benefit of the lien which the landlord may have upon the crops of the tenant.<sup>50</sup> A landlord who endorses a rent note in blank, hands it to his tenant and also gives him a letter directed to his creditors in which he informs them that he surrenders the note, is estopped as against creditors who paid value for the note, from denying that it was a valid existing debt and a lien on the crop. The tenant is also estopped.<sup>51</sup> So, in Mississippi a landlord, by a conveyance of the premises, loses his rent lien on a crop though he still has the rent note. The conveyance of the premises carries with it as an incident the right to sue on the rent note and the grantee also takes the lien and may enforce it against the tenant and he may also sue on the note.<sup>52</sup> The Alabama statute providing that a landlord's lien for rent or for advances shall pass as an incident of an assignment of the rent, does not permit the landlord to assign to another his right to make advances and to enforce a lien for the same.<sup>53</sup> In Georgia the contrary rule is held and a landlord who has under the statute assigned his lien for his advances to the tenant to a person who has furnished supplies to the tenant, is estopped to attack the validity of his assignment<sup>54</sup> in an action to enforce the lien brought by the assignee. Upon general principles and aside from express statutory provisions, there seems to be no good reason why the conveyance of the reversion or the assignment of the claim of the landlord for his rent should not also pass to the assignee a right to enforce any lien which the assignor may have enjoyed. It would seem that the lien is merely an incident of the principal thing which is the rent. The assignee of the rent, or

<sup>49</sup> Coker v. Britt, 78 Miss. 583, 29 So. Rep. 833.

Mayfield, 107 Ala. 306, 18 So. Rep. 29.

<sup>50</sup> Newman v. Bank of Greenville, 66 Miss. 323, 5 So. Rep. 753.

<sup>52</sup> Leslie v. Hinson, 83 Ala. 266, 3 So. Rep. 443; Henderson v. State, 109 Ala. 40, 19 So. Rep. 733.

<sup>51</sup> Newman v. Bank, 66 Miss. 323, 5 So. Rep. 753.

<sup>54</sup> Zachry v. Stewart, 67 Ga. 218, 220; Mercer v. Cross, 79 Ga. 432,

<sup>52</sup> Watkins v. Duvall, 69 Miss. 364, 13 So. Rep. 727. A landlord may mortgage his interest in a lien on crops where the lien is assignable by statute. Ballard v.

434, 5 S. E. Rep. 245. The lien may be assigned before the supplies are furnished. Benson v. Gottheimer, 75 Ga. 642.

the grantee of the reversion, would doubtless be entitled to enforce any lien in favor of his assignor in all states where by statute an assignee or grantee has conferred upon him by a statute all the rights and remedies which were enjoyed by his assignor or grantor prior to the transfer. And in reason and common sense there seems to be no justice or fairness either in permitting a landlord to enforce a lien for rent where he has assigned his right to recover the rent by action or in permitting the lien to go out of existence merely because of that fact. This is equivalent to depriving the assignee of his surest remedy against an insolvent tenant or against one who willfully refuses to pay the rent. In states where a lien created by statutes passes as an incident of the assignment of a claim for rent, it is competent for the landlord to reserve the lien in assigning the claim. An agreement between a landlord and his tenant reserving the lien to the landlord where the rent note is transferred, is valid and cannot be attacked by third parties. The landlord may, where he has retained his lien as security for his endorsement of the rent note, foreclose it where the note is not paid, and his foreclosure cannot be set aside at the suit of a judgment creditor of the tenant.<sup>55</sup>

**§ 827. The nature of the indebtedness.** In order that a landlord may take advantage of a statutory or contract lien expressly given or created for rent, he must show that his claim is for rent exclusively.<sup>56</sup> This rule is analogous to the rule that a landlord may not distrain except for rent.<sup>57</sup> The same is true in

<sup>55</sup> *Strickland v. Stiles*, 107 Ga. 308, 33 S. E. Rep. 85.

<sup>56</sup> *Cranston v. Rogers*, 83 Ga. 750, 10 S. E. Rep. 364.

<sup>57</sup> Distress cannot be maintained for interest accruing on unpaid rent, or on an attorney's fees which have been agreed to be paid in any action to enforce any provision of the lease. *Tanton v. Boomgaarden*, 89 Ill. App. 500, nor on a past indebtedness which the tenant agrees to pay the landlord as rent in addition to the rent agreed on in the lease. *Paxton v. Kennedy*, 70 Miss. 865, 12 So. Rep. 546. "The right and the

remedy of the landlord are established and fixed by the law, and rest upon the existence of the relation of landlord and tenant and it is an essential fact that the demand of the landlord shall be for the rent of the land. The agreement of the tenant to pay an antecedent debt, as rent, does not and cannot change its nature or bring it within the statute. A past due debt is not rent, and calling it such, or agreeing that it should be so treated and considered, cannot entitle the creditor to resort to the summary remedy for its collection." By the

the case of a lien for advances made by the landlord. If the landlord blends the rent or advances made by him with other items for which he has no lien so that it is impossible to separate them or to know which is rent and which advances and which is not, he cannot enforce his lien.<sup>58</sup> For a lien which is expressly given by a statute for rent cannot be enforced where the consideration to the landlord is for rent and other purposes and it is impossible to determine how much of his claim is rent.<sup>59</sup> The rate of rent and the place of its payment must both be certain in order that a lien may be enforced.<sup>60</sup> A landlord's lien for advances made by him to a tenant for supplies to make a crop, does not secure the landlord who merely guarantees the payment for supplies which are furnished to the tenant by others.<sup>61</sup> The lien is given to secure certain debts due by the tenant to the landlord, and it cannot be taken advantage of by other persons,<sup>62</sup> nor even by the landlord himself unless for the particular sort or class of debts which are expressly described in the statutes.<sup>63</sup> So a lien for advances by the landlord made on the tenant's crop "either directly, or by another at his instance or request, or for which he became legally bound or liable at or before the time such advances were made," does not include a liability to a third person, the payment of which was assumed by the landlord without the knowledge and consent of the tenant.<sup>64</sup> It is a general rule of the law of partnership that a contract made by a member of a partnership before he joined it, though it arose out of the business to which the partnership succeeded, carried on by the maker of the contract, does not bind the firm unless it is afterwards ratified by the partners. So the debts of the firm take precedence over the individual debts of each partner and must be paid before the partners' individual debts are paid. Under this rule a landlord has no lien upon partnership assets consisting of crops

court in *Paxton v. Kennedy*, 70 Miss. 865.

<sup>58</sup> *Smith v. Dayton*, 94 Iowa, 102, 107, 62 N. W. Rep. 651.

<sup>59</sup> *Crill v. Jeffrey*, 95 Iowa, 634, 637, 64 N. W. Rep. 625.

<sup>60</sup> *Glasgow v. Ridgeley*, 11 Mo. 34, 41; *Central Bank of New Jersey v. Peterson*, 24 N. J. Law 668; see, also, *Beck v. Wisely*, 52 Mo. App. 242.

<sup>61</sup> *Ellis v. Jones*, 70 Miss. 60, 63, 11 So. Rep. 566; *Kaufman v. Underwood* (Ark. 1907) 102 S. W. Rep. 718.

<sup>62</sup> *Jamison v. Acker*, (Mo.) 14 S. W. Rep. 691.

<sup>63</sup> *Tucker, Zeve & Co. v. Thomas*, 35 Tex. Civ. App. 499, 80 S. W. Rep. 649.

<sup>64</sup> *Clanton v. Eaton*, 92 Ala. 612, 8 So. Rep. 823.

raised upon land demised to the firm for rent and for supplies which were furnished a member of the firm before the partnership was created. This, of course, is always the rule aside from common law rules where the statute expressly provides that in order for a landlord to have a lien for supplies they must have been furnished to the tenant who make the crop.<sup>65</sup> In determining the extent of the lien of the landlord everything depends on the exact language of the statute. A statutory lien to secure the payment of rent and other obligations of the lease will protect a landlord against the tenant's breach of a covenant to repair, and to keep in repair, contained in the lease.<sup>66</sup> But a lien for rent merely does not include the obligations of the tenant under his covenant to pay taxes,<sup>67</sup> nor does a statutory lien for advances secure the payment of rent.<sup>68</sup>

**§ 828. What will constitute an advancement to the tenant within the statute.** In the judicial consideration of statutes which give a landlord a lien for the value of supplies or advances made by him to the tenant, it often becomes of paramount importance to define the words "advancements, supplies," or similar words and to ascertain the character of the things that may be included within the scope of their meaning. Speaking broadly and where the term is not expressly defined or limited in its meaning by the statute, supplies or advancements are anything, whether money or merchandise, which is supplied by the landlord to the tenant in good faith and which is to be used by the tenant in making or saving a crop. Hence, it would seem that the lien for advancement is confined usually to the case of the leasing of farm lands. Very often the statute points out the character of the things which will constitute an advance and the

<sup>65</sup> Reynolds v. Hindman, 88 Ga. 314, 14 S. E. Rep. 47, 471.

<sup>66</sup> Warfield v. Oliver, 23 La. Ann. 612.

<sup>67</sup> Binns v. Hudson, 5 Binn. (Pa.) 505, 506.

<sup>68</sup> Dunn v. Spears, 5 Rich. (S. Car.) 17. A statute creating a lien for rent "agreed to be paid" does not require an express agreement to pay rent. Love v. Law, 57 Miss. 596, 598. The statute of Louisiana giving a lien for the

rent and "other obligations of the lease," does not give a lien for a balance due for sugar cane made into sugar on the leased premises by the lessee but grown by the lessor on other land not included in the lease and delivered to the lessee under a contract of purchase and sale which was separate from the lease. Burdon Cent. Sugar Refining Co. v. Payne, 81 Fed. Rep. 663, reversing 78 Fed. Rep. 417.

purpose for which the articles must be used by the tenant. For it is not every advance which the landlord may make, even to his tenant, which comes within the rule of the statute. The advance must be of some one or more of the articles enumerated in the statute and for some one or more of the purposes mentioned, or there will be no lien on the crops.<sup>69</sup> Under a statute creating a lien for advances and necessary supplies to enable a tenant to make and gather his crop, it will be presumed that advances for ginning and wrapping cotton, and for pasturing cattle were for necessary supplies.<sup>70</sup> So a lien for advances of money or other things for the sustenance of the tenant or his family or for cultivating the ground or preparing a crop includes blacksmith tools furnished by the landlord.<sup>71</sup> And pasturage for the tenant's cattle used by him in cultivating the farm and for his cows whose milk sustained the tenant and his family, which is furnished by the landlord on pasture not included in the demised land is "supplies" under the lien statute.<sup>72</sup> Many things which may be supplied to a tenant by his landlord are presumptively advancements within the statute and show the purpose of the advancement by their very nature. Thus food for the tenant and his animals, seed for a crop, draught animals and farming implements which are appropriate to the cultivation of the land in question, speak for themselves and will be presumed to have been delivered to the tenant for the purpose mentioned in a statute which requires that the advancement must be made for making or saving a crop. Other things may be advancements under certain circumstances, though they may not always be presumed to be such. This would be so in the case of shoes, dry goods, clothing, tobacco and the like which the tenant may use to pay his laborers in order to secure their services in aiding him in planting or in harvesting his crops. In the case of the latter articles it must be affirmatively shown

<sup>69</sup> Powell v. State, 84 Ala. 444, 445, 4 So. Rep. 719.

<sup>70</sup> Knott v. Giles, 27 App. D. C. 581.

<sup>71</sup> Holladay v. Rutledge, 145 Ala. 656, 39 So. Rep. 613.

<sup>72</sup> Thomas v. Tucker, (Tex.) 89 S. W. Rep. 802. The lien given for advances under sec. 2703 of the Alabama Code embraces everything of value for the sustenance

and well-being of the tenant or his family, for preparing the ground for cultivation, or for cultivating, gathering, saving, handling or preparing the crop for market. These are comprehensive words and would embrace everything useful for the purposes enumerated. Cockburn v. Watkins, 76 Ala. 486.

that the landlord supplied them to the tenant for the purpose enumerated in the statute, and if this be shown, the landlord shall have his lien irrespective of the fact that the tenant, after having received such articles, diverted them to other uses not contemplated by the statute. But generally to constitute an advance the landlord must furnish, or cause to be furnished, something not already belonging to the tenant. His mere forbearance to demand or to enforce some claim which is due him from the tenant does not give him a lien for advances to the tenant.<sup>73</sup> A landlord who merely guarantees payment for supplies furnished the tenant by another cannot enforce a lien for supplies.<sup>74</sup> So, by the same reasoning, the act of the landlord in endorsing a note of the tenant given by the tenant to a third party for supplies, or the landlord having supplies sold to the tenant by a third party charged to him, gives the landlord no lien for supplies under a statute creating a lien for supplies furnished the tenant by the landlord. But cash furnished by the landlord to the tenant for supplies brings the case under lien statute. And a claim for a balance due for advances already made under a lease which has expired, may be considered as a new advance where the tenant holds over and thus continues his tenancy under the same landlord.<sup>75</sup> When a

<sup>73</sup> Lumbley v. Gilruth, 65 Miss. 23, 26, 3 So. Rep. 77.

<sup>74</sup> Ellis v. Jones, 70 Miss. 60, 11 So. Rep. 566.

<sup>75</sup> Reese v. Rugely, 82 Ala. 267, 268, 2 So. Rep. 441. A lien created by a clause in the instrument of lease by which the landlord is given security for supplies which he furnished or may furnish to enable the tenant to make a crop, includes money paid to the tenant with which the latter pays his hands who cultivate and gather the crop. Strickland v. Stites, 107 Ga. 308, 33 S. E. Rep. 83. "An advancement in the sense of the statute, is anything of value pertinent for the purpose to be used directly or indirectly in making and saving the crop supplied in good faith to the

lessee by the landlord. Many things are, in their nature and adaptation, *per se* pertinent for such purpose, and presumptively constitute advancements whenever so supplied. Thus, subsistence for the tenant and his employees and work animals, appropriate farming implements and the like are advancements when so supplied. These and other like things are directly appropriate for such purpose, and when supplied to that end make advancements. They are presumed to be such. There are other things not directly so appropriate—such as shoes, tobacco, dry-goods, groceries and the like, which the landlord may supply to the lessee to pay his laborers. When such supplies are made, whether they make ad-

statute confers the right to distrain for rent or advances which are due and not paid or for those which may become due, the maturity of the advances or of the rent is a condition precedent to the exercise of the landlord's right to distrain. When the evi-

vances or not, depends on whether they were supplied for the purpose specified. It must appear affirmatively that they were. That the lessee diverts such things from the purpose contemplated cannot change their nature and the purpose of them. *Womble v. Leach*, 83 N. C. 84; *Ledbetter v. Quick*, 90 N. C. 276." By the court by Merrimon, C. J., in *Brown v. Brown*, 109 N. Car. 124, p. 127, 13 S. E. Rep. 797. A statute which gives the landlord a lien for advances in money or property by the landlord or by another at his request to the tenant for sustenance or for cultivating the crop is meant to enable the tenant to sustain himself and family and to carry on the cultivation of the crops from the time of the preparation of the soil until the crop is ready for market. The lien is to secure the landlord for any liability he may have assumed either by supplying the advances himself or by procuring others to do so. When a third party makes the advances it is necessary that the landlord should have made himself liable to the third party in order that he may enforce the lien even though the advances may have been made at his request. So, also, the assent of the tenant must be shown either to the making of the advances by the landlord, directly or to his becoming liable for the same, or his subsequent ratification. For no one can voluntarily pay another's debt,—with-

out his request, consent or ratification, and thus constitute himself a creditor of the other. *Clanton v. Eaton*, 92 Ala. 612, 615, 8 So. Rep. 823. Board for a tenant is "supplies" under a statute giving a landlord a lien for supplies furnished a tenant. *Jones v. Eubanks*, 81 Ga. 616, 12 S. E. Rep. 1065. So are mules rented or sold to the tenant by the landlord and food, farming utensils and provender for stock, *Trimble v. Durham*, 70 Miss. 295, 297, 12 So. Rep. 207; *Strauss v. Baley*, 58 Miss. 131, 138; but tobacco, dice, whiskey, cards and perfumery are not supplies necessary to save a crop. *Stafford v. Pearson*, 26 La. Ann. 658. Board furnished the lessee and his family to enable the lessee to save his crop is an "advancement" for which the lessor has a lien without proof of any express agreement between the parties that it was to be deemed an advancement. *Brown v. Brown*, 109 N. Car. 124, 13 S. E. Rep. 797. When a statute confers the right to distrain for rent or advances which are due and not paid or for those which may become due, the maturity of the advances or of the rent is a condition precedent to the exercise of the landlord's right to distrain. When the evidence is clear that there was no agreement between the parties to this lease as to the time when the advances were to be repaid the rule is that the advances are due at once or as soon as their repay-

dence is clear that there was no agreement between the parties to this lease as to the time when the advances were to be repaid, the rule is that the advances are due at once or as soon as their repayment is promised by the tenant.

**§ 829. To what property the statutory lien attaches.** The statutes creating liens for rent usually specify with great particularity the character of the property upon which the landlord shall have a lien. Thus, in many of the states it is provided by statute that he shall have a lien for his rent or advances upon the crops of the tenant growing upon the land. Sometimes the lien is made to reach all crops growing upon the land whether they are owned by the tenant or by his sub-tenant, or by an assignee of a tenant.<sup>76</sup> In some states the landlord has, by statute,

ment is promised by the tenant. "If, without qualification, one promises to pay money to another, either general or on demand, it becomes due simultaneously with the promise." Bish. Contracts § 1437. The fact that the rent is payable on dates specified in the lease and that the landlord has no lien for the rent until it becomes due and payable does not where the lease is silent as to when the money advanced is to be paid, render the advances due and payable on the days agreed upon for the payment of the rent. For a party loaning money may act upon the general rules of the law of contract though the borrower be his tenant, and the statute expressly gives him a remedy by way of a lien on the personal property of his debtor which other creditors do not possess. Hence a suit for double damages brought for distraining for advances not due cannot be maintained as the advances become due immediately and not at the expiration of the term. Thomson v. Tilton, 22 Ky. Law. Rep. 784. 59 S. W. Rep. 485.

<sup>76</sup> Edwards v. Anderson, (Tex.) 1904.) 82 S. W. Rep. 659; Marrs v. Lumpkin, 22 Tex. Civ. App. 448, 54 S. W. Rep. 775; Forrest v. Durnell, 86 Tex. 647, 26 S. W. Rep. 481. The consent of the landlord to a subletting of the leased premises is not a waiver of his lien for rent upon the crops grown by the subtenant. Williams v. Braden, 2 Mo. App. Rep'r, 846, 63 Mo. App. 513. A statutory lien for rent on the crops of the tenant attaches to all the crops though the tenant has set apart a certain portion of them to pay the rent. State v. Reeder, 36 S. Car. 497, 15 S. E. Rep. 544. Under a statute giving a lien on all crops on the premises, the landlord has a lien for rent on the crop of a sub-tenant. Beck v. Minnesota & Western Grain Co., 131 Iowa, 62, 107 N. W. Rep. 1032. A statute giving a landlord a lien on crops does not give him a lien for rent of vacant ground on a building erected on it by the tenant. Allen v. Houston Ice & Brewing Co., Tex. 1907, 97 S. W. Rep. 1063.

a lien not only for rent but for any advances he may make to his tenant for labor or supplies. The statutory lien for rent, supplies and advances as a rule extends only to the crops of the year in which the rent accrued or the supplies were furnished.<sup>77</sup> A lien upon crops growing or grown upon the demised premises in any year for rent which shall accrue for that year, is not confined to any particular crop or to any portion of the crop. The lien attaches from the time of the commencement of the growth of the crop whether the rent is then due or not; and the lien is not defeated by a sale of the crop to a person who knows of the tenancy and of the fact that the crop was grown upon the demised premises. If the lien is by statute upon crops growing or grown upon the premises it does not depend for its inception upon the fact that the rent is due but rather upon the beginning of the growing crop. If the former were the case the landlord would have no security for his rent until perhaps long after the crops, in due course of nature, had matured.<sup>78</sup> Sometimes the lien is upon all buildings erected upon the premises, though they may be owned by other persons than the lessee and irrespective of the fact that the land was not leased for the purpose of erecting such buildings.<sup>79</sup> By some of the statutes the landlord has a lien for rent on personal property of the tenant which is kept or used upon the premises during the term.<sup>80</sup> The statute does not include the use by a railroad of its rolling stock in a leased station building.<sup>81</sup> A

<sup>77</sup> Parks v. Simpson, 124 Ga. 523, 52 S. E. Rep. 616; Ball, Brown & Co. v. Sledge, 82 Miss. 749, 35 So. Rep. 447, 449; Walker v. Patterson, 33 Tex. Civ. App. 50, 77 S. W. Rep. 437.

<sup>78</sup> Harvey v. Humpton, 108 Ill. App. 501, 503; Watt v. Scofield, 76 Ill. 261; Prettyman v. Unland, 77 Ill. 206.

<sup>79</sup> Union Water Power Co. v. Chabot, 93 Me. 339, 45 Atl. Rep. 30; Maine Rev. St. c. 91, sec. 37.

<sup>80</sup> Becker v. Dalby, (Iowa 1901) 86 N. W. Rep. 314; McClain's Code, Iowa, § 3192.

<sup>81</sup> Trust Co. of North America v. Manhattan Trust Co., 23 C. A. 30, 77 Fed. Rep. 82, in which it was

said, "If the legislature had intended to fix a lien on the rolling stock of a long line of railroad running in and out of a leased station, language more appropriate for the purpose would have been used. The rolling stock of the railroad company upon which a lien is claimed under the statute was used for traffic purposes over the whole line of its road, extending into two states, and on connecting lines to the extent that such use is usual and customary among railroads. The rolling stock is not a fixture on the premises and was not "used on the premises," at all, further than to be run in and out of the leased

lien on the tenant's property which is used on the premises includes only his personal property which is used on the premises during the term for purposes and in a nature of use which are incidents of the object and purpose of the tenancy.<sup>82</sup> It may attach to goods kept for sale by the tenant upon the premises. Thus it will not attach to cattle kept for sale only and which are sold in the ordinary course of trade by the tenant before the lien is enforced, though the lien may attach to cattle kept on the premises and fed in the ordinary way for the purpose of improving them as a part of a farmer's ordinary occupation.<sup>83</sup> Nor does such a lien upon property used on the premises include teams used for the delivery of goods but not kept on the premises nor notes and open accounts growing out of the business carried on in the premises.<sup>84</sup> So, too, a statute giving a landlord a lien on goods of a tenant used on the premises, gives no lien on goods owned by a third person but which are used by the tenant upon the premises.<sup>85</sup> A statute that creates a lien on the personal property of a tenant used and kept in the building does not affect the property of one member of a partnership kept and used by the firm in premises which had been leased to the firm, and the rent is ex-

station at Sioux City while being used for traffic purposes over its own and connecting lines.

<sup>82</sup> *Grant v. Whitwell*, 9 Iowa, 152, 155. It is not confined to farm implements only.

<sup>83</sup> *Thompson v. Anderson*, 86 Iowa 703, 53 N. W. Rep. 418, 419. The purpose of the Iowa statute is to give a lien on all personal property of the tenant not exempt from execution to the maintenance or improvement of which the premises have contributed, as well as upon the work, animals, tools and machinery with which the premises, when farm lands, have been cultivated. The reason on which the lien is grounded is that the use of the premises has contributed to the production, improvement or maintenance of the property upon which the lien at-

taches. Where land is used for raising or improving stock the products of the land are fed to the stock and the lien necessarily attaches to such stock. If stock is kept for sale only and the premises were leased solely for that purpose the lien attaches, subject to its being defeated by the sale of the stock in the ordinary course of business. *Thompson v. Anderson*, 86 Iowa 703, 706, 707, 53 N. W. Rep. 418. The lien attaches not only to property on agricultural lands but also to that in houses and store rooms in cities. *Grant v. Whitwell*, 9 Iowa 152, and see, also, *Nesbitt v. Bartlett*, 14 Iowa 485.

<sup>84</sup> *Van Patten v. Leonard*, 55 Iowa 520, 8 N. W. Rep. 334.

<sup>85</sup> *Perry v. Waggoner*, 68 Iowa 403, 405, 27 N. W. Rep. 292.

clusively a firm debt or liability.<sup>86</sup> A statutory lien on "goods, furnitures and effects" of the tenant applies only to such effects as have enjoyed the protection of the premises. The word "effects" will be construed in connection with goods and furniture and will be confined to property *eiusdem generis*. It will not include a mule and dray owned by the tenant and used by him in his business, nor goods sold in the usual course of trade, nor accounts due for such goods legitimately sold by the tenant, nor the money which is the proceeds of such notes,<sup>87</sup> nor a leasehold interest owned by the tenant.<sup>88</sup> Elsewhere it has been held that a statutory lien on "movable effects" of the tenant includes notes, bills of exchange, certificates of stock and the like which are found on premises leased to bankers for carrying on their business, though the statute giving the lien expressly refers also to furniture and merchandise in a house or shop.<sup>89</sup> A lien created by statute on growing crops does not attach to a building erected by a tenant on a vacant lot. Nor is a landlord of a vacant lot en-

<sup>86</sup> Ward v. Walker, 111 Iowa 611, 82 N. W. Rep. 1028. A statute which gives the landlord a lien upon the property of the tenant is strictly construed in favor of the tenant. It creates no lien in favor of the landlord upon the fixtures and furniture of the tenant where they are not the actual personal property of the tenant but are owned by third persons. Davis v. Washington, 18 Tex. Civ. App. 67, 43 S. W. Rep. 585. "Liens of this kind, arising under the act of Congress, attach at the commencement of the tenancy, or whenever personal chattels, owned by the tenant and subject to execution for debt, are brought on the premises. Statutory liens have, without possession, the same operation and efficacy that existed in common law liens where the possession was delivered. Personal chattels on the premises sold in the ordinary course of trade, with-

out knowledge of the lien, are not subject to its operation, or, in other words, the lien in respect to such sales where the goods are removed from the premises is displaced, and the purchaser takes a perfect title to the property discharged of the lien. Webb v. Marshall, 13 Wall (U. S.) 15; Grant v. Whitwell, 9 Iowa 153; Doane v. Garretson, 14 id. 351; Marr v. Sheffner, 2 East, 523; Burton v. Smith, 13 Pet. 483; Fowler v. Rapley, 15 Wall. 336." By the court in Beall v. White, 94 U. S. 382 on page 386.

<sup>87</sup> McKlewy v. Canty, 95 Ala. 295, 11 So. Rep. 258, 259; Abraham v. Nicrosi, 87 Ala. 173, 6 So. Rep. 296.

<sup>88</sup> First National Bank v. Consol. Elec. Light Co., 97 Ala. 465, 12 So. Rep. 71.

<sup>89</sup> Matthews v. His Creditors, 10 La. Ann. 718, 719; Stone's Succession, 31 La. Ann. 311, 312; Bazin v. Segma, 5 La. Ann. 718.

titled to a lien which by statute is given to a landlord of a residence or other building.<sup>90</sup>

**§ 830. The inclusion in the landlord's lien of the goods of sub-tenants.** As a general proposition a statutory lien given to the landlord for his rent or for his advances to a tenant upon the crops, buildings or other personal property upon the premises, includes not only such property when it is owned by the tenant but also property which is owned by subtenants as well. But the lien may, by express language used in the statute, be restricted in its operation to the personal property of the tenant. Everything depends on the exact language of the statute. Thus a statutory lien given to the landlord for rent upon all crops grown or growing upon the premises, includes crops which have been planted and are owned by a subtenant on the premises.<sup>91</sup> So, also, in the case of a stipulation in the lease for a lien for rent upon buildings erected by a tenant on the land, buildings which are erected by a sub-tenant are subject to the lien.<sup>92</sup> So under some of the statutes it has been held that a landlord's lien for rent on the personal property and effects upon the premises attaches to the personal chattels of a sub-tenant which are found upon the premises irrespective of the fact that the subtenant may have paid all rent which was due by him to his immediate lessor.<sup>93</sup> All these propositions of law impressing a lien upon the

<sup>90</sup> Meyer v. O'Dell, 18 Tex. Civ. App. 210, 44 S. W. Rep. 545. See, as to lien on the tenant's property situated "in the residence." York v. Carlisle, 19 Tex. Civ. App. 269, 46 S. W. Rep. 257.

<sup>91</sup> Givens v. Easley, 17 Ala. 385; Foster v. Goodwin, 82 Ala. 384, 2 So. Rep. 895; Andrew v. Stewart, 81 Ga. 53, 7 S. E. Rep. 169; Thompson v. Commercial Guano Co., 93 Ga. 282, 20 S. E. Rep. 309; Houghton v. Bauer, 70 Iowa 314, 315, 30 N. W. Rep. 577; Foster v. Reid, 78 Iowa 205, 206, 42 N. W. Rep. 649, 16 Am. St. Rep. 437; Hollingsworth v. Hill, 69 Miss. 73, 10 So. Rep. 450; Applewhite v. Nelms, 71 Miss. 482, 14 So. Rep. 442; Phil-

lips v. Burrows, 2 Mo. App. Rep. 1001; Rutledge v. Walton, 4 Yerg. (Tenn.) 458, 459; Stokes v. Burney, 3 Tex. Civ. App. 219, 22 S. W. Rep. 126; Forrest v. Durnell, 86 Tex. 647, 26 S. W. Rep. 481; compare, as limiting the general rule, Lehman v. Howze, 73 Ala. 302. An exception to the rule of the text may be made in a case where the landlord consented to or ratified the sublease. Andrew v. Stewart, 81 Ga. 53, 7 S. E. Rep. 169.

<sup>92</sup> Willard v. Rogers, 54 Ill. App. 583.

<sup>93</sup> McComb's Appeal, 43 Pa. St. 435. In Louisiana the later cases are *contra* to the rule of the text

crops or other personal property of the sub-tenant upon the premises are based upon the general principle that a sub-tenant is conclusively presumed to take his lease and to enter into possession with knowledge, actual or constructive, of the contractual and statutory obligations of his immediate lessor to the original landlord. So far as a lien created by the terms of the lease is concerned it is the duty of the sub-tenant to inform himself which he neglects at his own risk. As regards statutory liens, sub-tenants, like everyone else, are presumed to know the law of the land.

**§ 831. The ownership and possession of the property subject to a lien.** The statutory lien of the landlord for rent due or for advances made by him upon the tenant's crop or other personal property of the tenant, does not give the landlord a legal title to the crop or other property or any right to its possession.<sup>94</sup> It merely furnishes him with a prompt and effective remedy to collect his rent or advances when they are due. The tenant's ownership of the chattel, his right to its actual possession and his power to dispose of it are in no wise restrained thereby except so far as may be necessary to enforce the lien<sup>95</sup> of the landlord. The tenant may sell or mortgage the crop subject to the lien,<sup>96</sup> which will be enforceable against the purchaser when the crop matures or when the rent is due. In the meantime the landlord has no legal title to the crop which will enable him to maintain an action of trover or conversion or replevin to recover its possession, either against the tenant or against one to whom the tenant has sold the crop.<sup>97</sup> Thus the lessor cannot, before his

though the earlier cases sustain the text. *Campbell v. Fowler*, 28 La. Ann. 234; *Freeland v. Hyllestved*, 24 La. Ann. 450. "If parcelled out to others, by subletting or otherwise, on terms consistent with the provisions of the lease, their crops are the lessee's crops for the purpose of securing the rent, and with the same rights and interests of the lessor in enforcing payment. The land and the crops to be grown cannot be freed from the conditions imposed by law nor can the lessor's rights be abridged by any subordinate

contracts of the lessee. He can pass no better estate, nor confer any superior rights to the use of the land, than he possesses himself. If it were otherwise the subletting in parts might defeat the security given under the statute, and render it inoperative." By the Court in *Montague v. Mial*, 89 N. Car. 137, 139.

<sup>94</sup> *Bell v. Matheny*, 36 Ark. 572.

<sup>95</sup> *Scaifer v. Stovall*, 67 Ala. 237.

<sup>96</sup> *Wilkinson v. Ketter*, 69 Ala. 435.

<sup>97</sup> *Warrill v. Barnes*, 57 Ga. 404; *Frink v. Pratt*, 130 U.S. 227, 23 N.

rent is due, replevin a crop on which he has a lien from a constable or sheriff who has seized it under an execution against the tenant.<sup>98</sup> Even an express agreement in the lease that the landlord may take possession of the crop in case of the non-payment of the rent by the tenant gives the landlord no right to do so until the rent is due.<sup>99</sup>

**§ 832. The removal and sale of the property which is subject to the lien.** As a general proposition the removal of goods which are affected by a lien from the premises by the tenant, unless by or with the consent of the landlord, does not deprive the latter of any statutory lien for rent or advances, unless their presence upon the premises is a condition precedent to his having a lien.<sup>1</sup> A statutory lien for rent upon a crop does not of necessity prohibit the tenant from removing a portion of it from the premises unless the action of the tenant hinders or injures the landlord's claim for rent. This is a question for the jury, and is not to be determined by any consideration of the tenant's solvency but solely by the relation of the amount of rent to the value of the crop.<sup>2</sup> In some cases the lien is applicable only to property which is on the premises. In such a case by consenting to the sale and removal of the crop by one to whom the tenant has sold it the landlord waives his lien.<sup>3</sup> Where a lien is applicable only to crops growing on the premises the question of the landlord's

E. Rep. 819; *Sheble v. Curdt*, 56 Mo. 437; *Hardaman v. Shumate*, 19 Tenn. (Meigs) 398; *contra* *Baxter v. Bush*, 29 Vt. 465, 70 Am. Dec. 429. And see, also, *Holey v. Hews*, 3 La. Ann. 704.

<sup>98</sup> *Travers v. Cook*, 42 Ill. App. 580.

<sup>99</sup> *Sheble v. Curdt*, 56 Mo. 437.

<sup>1</sup> *Holdane v. Sumner*, 82 U. S. 600, 21 L. Ed. 254; *Lomax v. Le Grand*, 60 Ala. 537; *Andrews Mfg. Co. v. Porter*, 112 Ala. 381, 20 So. Rep. 475, 476; *Grant v. Whitwell*, 9 Iowa 152; *Carpenter v. Gillespie*, 10 Iowa 592; *Richardson v. Peterson*, 58 Iowa, 724, 13 N. W. Rep. 63; *Holden v. Cox*, 60 Iowa, 449, 15 N. W. Rep. 269; *Stone v. Bohm*, 79 Ky. 141; *Warrell v. Vickers*, 30

La. Ann. 202; *Henry v. Davis*, 60 Miss. 212; *Fitzgerald v. Fowlkes*, 60 Miss. 270; *Newman v. Bank of Greenville*, 66 Miss. 323, 5 So. Rep. 753; *Aikens v. Stadell*, 9 Kan. App. 298, 61 Pac. Rep. 325; *Brown v. Noel*, 21 Ky. Law. Rep. 648, 52 S. W. Rep. 849; *Finney v. Hard-ing*, 136 Ill. 573, 27 N. E. Rep. 289, reversing 32 Ill. App. 98.

<sup>2</sup> *Hazeltine v. Ausherman*, 87 Mo. 410.

<sup>3</sup> *May v. McGaughhey*, 60 Ark. 357, 360, 30 S. W. Rep. 417. In Louisiana, if a tenant removes some property pledged from the premises, the landlord may at once seize the balance though rent is not yet due. *Millot v. Conrad*, 112 La. 928, 36 So. Rep. 807.

security by the crop remaining after the tenant has removed a portion of it is to be determined by the landlord, and if by this his lien is in danger, he may foreclose though the rent is not yet due.<sup>4</sup> It may properly be stipulated by the parties that the rent shall become due and payable in case the tenant removes or attempts to remove property which is subject to the rent lien. A provision that the whole rent shall become due if the lessee attempts to remove or manifests an intention to remove his goods from the demised premises without having paid all the rent which shall become due and payable during the term, does not require the removal or the attempt to remove, to be fraudulently or secret. So where the lessee makes an assignment for the benefit of creditors, the lessor may distrain the goods in the hands of the assignee while they are on the premises.<sup>5</sup> In most cases the removal of personal property from the premises endangers the lien where the rent has not accrued. Though the removal of the property to which the lien for rent attaches may not defeat the lien it most assuredly will render the enforcement of the lien difficult and inconvenient and often impossible. If the rent is due the landlord may and ought to enforce the lien at once as soon as a sale or attempt to remove the property comes to his knowledge, while if the lien is for future rents equity may under proper circumstances, as the landlord has no remedy at law and irreparable damages is imminent, enjoin this sale and the removal of the property.<sup>6</sup>

**§ 833. The distinction between the common law and equitable doctrines regarding liens on after-acquired property.** The growth in modern times of a custom of inserting in leases a clause creating an express contractual lien for rent upon personal property of the tenant to be grown or placed in the future on the demised premises renders it necessary to consider some of the general rules regulating transfers of after-acquired property. At the common law a grant or mortgage of property which was not in existence, or which if in existence was not owned by the grantor or mortgagor, was void and conveyed no title or lien to the grantees or mortgagees as against third persons subsequently dealing with the property.<sup>7</sup> A question differ-

<sup>4</sup> *Millot v. Conrad*, 112 La. 928, 36 So. Rep. 807.

<sup>5</sup> *Goodwin v. Sharkey*, 80 Pa. St. 149.

<sup>6</sup> *Miller v. Bider*, (Iowa, 1906) 105 N. W. Rep. 594.

<sup>7</sup> *Apperson v. Moore*, 30 Ark. 56, 58; *Comstock v. Scales*, 7 Wis.

ing in degree but not in principle is presented for determination in a case where there is no sale of property or reservation of the ownership in the landlord of future crops to be raised by the tenant, but merely a lien upon such crops is given or where a lien is given to secure rent upon tools, fixtures and other personal property which are to be put upon the premises by the lessee during the term. At common law no legal title to the personal property vests in the landlord by this agreement, though in equity he would be regarded as having a valid and enforceable lien. For at common law the grant of a future interest is invalid though a power may be created to deal with property to be acquired in the future in such a way that the person who has the power given him may thereby become the legal owner of such property. Until the power to seize the personal property is executed the agreement for a lien is at law merely an executory contract giving the landlord no legal title as against third persons. The agreement for the landlord's lien operates merely as a license, or power, revocable in its nature until the landlord actually takes the goods, or the crops raised or the personal property brought on the land. The lien is then perfected and subsequent purchasers are bound by it. But prior to that time in law though not in equity the title was not absolute and if between the date of the lease and the taking possession of the property by the landlord the rights of *bona fide* purchasers or incumbrancers intervened the landlord was without any remedy.<sup>8</sup> The rule in equity as to such contracts is otherwise. The lease creating the lien on future acquired personal property of the tenant is regarded as a valid equitable chattel mortgage, the lien of which attaches to the crop or other per-

159; *Lingles v. Phelps*, 20 Wis. 398; *Mowry v. White*, 21 Wis. 421; *Cudworth v. Scott*, 41 N. H. 456; *Otis v. Sill*, 8 Barb. (N. Y.) 162; *Hitchcock v. Hassett*, 71 Cal. 331, 334, 12 Pac. Rep. 228. See, also, as to the rule at the common law *Jones v. Richardson*, 10 Met. (Mass.) 488; *Moody v. Wright*, 13 Met. (Mass.) 17, 29; *Head v. Goodwin*, 2 Cush. (Mass.) 294; *Codman v. Freeman*, 3 Cush. (Mass.) 306; *Gardner v. McEwen*, 19 N. Y. 125; *Otis v. Sills*, 8 Barb.

(N. Y.) 108, 4 Ohio (N. S.) 481; *Chapman v. Weiman*, 4 Ohio (N. S.) 481. A reservation of a lien on the personal property of the lessee situated on the leased premises, binds the property subsequently acquired by him and placed upon the premises. *Mathes v. Staed*, 67 Mo. App. 399; *Wright v. Bircher*, 72 Mo. 179.

<sup>8</sup> *Munsell v. Carew*, 2 Cush. (Mass.) 50, 51; *Butterfield v. Baker*, 5 Pick. (Mass.) 522; *Cooper v. Cole*, 38 Vt. 385.

sonal property as soon as it is acquired by the tenant. The lien attaches in equity and may be enforced as soon as the property is in the possession of the tenant.<sup>9</sup> Assuming that a lien may be created upon personal property to be acquired by the tenant in the future which shall be valid in equity if not at law, it often becomes necessary to determine by construing the lease whether or not the parties intended to create a lien on such property or only on property then owned by him. When a lessee by a contract places a lien upon his property generally without further description of locality or ownership it will be presumed that he refers to property then owned and nothing more. It is as though he had said "the lien for rent is to attach to property which I now own." This would unquestionably be the construction of an instrument conveying or mortgaging property without qualifying words. And there is no reason why another construction should be given to an instrument creating a lien. It should not be understood however that in equity a lien on future acquired property cannot be created by appropriate words. If the parties intend to do this their intention should be made to appear in express words. Nothing will be implied in this connection.<sup>10</sup>

<sup>9</sup> McCaffrey v. Woodin, 65 N. Y. 459, 467, 63 Barb. (N. Y.) 316. See also to the rule at common law, Congress v. Evetts, 10 Exch. 298; Carr v. Allott, 3 H. & N. 964.

<sup>10</sup> Borden v. Croak, 131 Ill. 68, 74, 22 N. E. Rep. 793, 19 Am. St. Rep. 23, affirming 33 Ill. App. 389. For the rule in equity see Holroyd v. Marshall, 10 H. L. Cases 191; Wright v. Bircher's Exrs, 72 Mo. 179, 37 Am. Rep. 433; Mitchell v. Winslow, 2 Story, 644; Langton v. Horton, 1 Hare, 549; Pennoch v. Coe, 23 How. (U. S.) 117; Sillers v. Lester, 48 Miss. 524; Butt v. Ellett, 19 Wall. 544; Driver v. Jenkins, 30 Ark. 120, 122; Apperson v. Moore, 30 Ark. 56, 58; Roberts v. Jacks, 31 Ark. 597, 602, 25 Am. Rep. 594; McClain v. Abshire, 72 Mo. App. 390; Willard v. World's Fair Encampment Co., 59 Ill. App. 336; Powell v. Daily, 163

Ill. 646, 45 N. E. Rep. 414, affirming 61 Ill. App. 552. "It seems to me a clear result of all the authorities, that wherever the parties, by their contract, intend to create a positive lien or charge, either upon real or personal property, whether then owned by the assignor or contractor, or not, or if personal property whether it is then *in esse*, or not, it attaches in equity as a lien or charge upon the particular property as soon as the assignor or contractor acquires a title thereto, against the latter, and all persons asserting a claim thereto under him, either voluntarily, or with notice, or in bankruptcy." Langton v. Horton, 1 Hare, 549. The two diverse views are thus stated by the case. The common law view is thus given in Otis v. Sill, 8 Barb. (N. Y.) 102; "That a grant of goods,

**§ 834. The liability of bona fide purchasers for value of a crop.** Applying general principles of equitable relief to the rights of one who, with no actual knowledge of the existence of a lien by a landlord upon the crop or other personal property of his tenant, buys such property from the tenant for a valuable consideration it may safely be said that such a purchaser should be protected. This will doubtless be the rule in a case where the landlord endeavors to enforce his lien against a purchaser who can prove his good faith and also that, at the time of the purchase, he was ignorant of the existence of the lien.<sup>11</sup> This is so

not in existence, or which do not belong to the grantor at the time of the execution of the deed, is void, unless the grantor ratify the grant by some act done by him with that view, after he has acquired the goods; that an assignment of property to be acquired in future, if valid in equity is only valid as a contract to assign when the property shall be acquired and is not an assignment of a present interest in the property and if enforced in equity, can only be enforced as a right under the contract, and not as a trust attached to the property as against the creditors of the assignor or mortgagor; that the mortgage of such subsequently acquired property can only be regarded as a mere contract to give further mortgage on such property, binding on the mortgagor personally and the only remedy of the mortgagee on such contract is that of a general creditor. The broadest contrary doctrine was announced by Mr. Justice Story in *Mitchell v. Winslow*, 2 Story, 630 as follows: "It seems to me the clear result of all the authorities, that whenever the parties, by their contract, intend to create a positive lien or charge, either upon real or personal property,

whether it is then *in esse* or not, it attaches in equity as a lien or charge upon the particular property as soon as the assignor or contractor acquires a title thereto, against the latter and all persons asserting a claim thereto under him, either voluntarily or with notice or in bankruptcy."

"*Burnett v. Bealmeir*, 79 Md. 36, 28 Atl. Rep. 898; *Foxworth v. Brown*, 120 Ala. 59, 24 So. Rep. 1, 4; *Lancaster v. Whiteside*, 108 Ga. 801, 33 S. E. Rep. 995; *Scaife v. Stovall*, 67 Ala. 237; *Manufacturing Co. v. Porter*, 112 Ala. 381, 39 So. Rep. 475; *Westmoreland v. Wooten*, 51 Miss. 825, 828; *Richardson v. McLaurin*, 69 Miss. 70, 12 So. Rep. 264; (following *Marje v. Dyche*, 42 Miss. 347) *Armstrong v. Walker*, 9 Lea, (Tenn.) 156; *Prickett v. Reed*, 31 Ark. 131; *Hunter v. Whitfield*, 89 Ill. 229, 231, 233; *Hadden v. Knickerbocker*, 70 Ill. 677, 22 Am. Rep. 80; *Prettyman v. Unland*, 77 Ill. 206; *Howe v. Clark*, 23 Ill. App. 345; *Finney v. Harding*, 136 Ill. 573, 27 N. E. Rep. 289, 12 L. R. A. 605; *Howe v. Clark*, 23 Ill. App. 145; *Fowler v. Hawkins*, 17 Ind. 211, 212; *Nesbitt v. Bartlett*, 14 Iowa 485, 487; *Grant v. Whitwell*, 9 Iowa, 152; *Scully v. Porter*, 3 Kan. App. 493, 501, 43 Pac. Rep. 824;

even though by statute the lien of the landlord is expressly declared to be paramount to all other liens except lien for taxes.<sup>12</sup> This rule is sustained by the majority of the cases while there are many authorities that are seemingly opposed to it. The apparent conflict of the decisions may be reconciled by determining just how much diligence a purchaser must use to ascertain the existence of the landlord's lien. Mere ignorance on the part of the purchaser of the fact that the property or crops purchased were used or grown on leased land, or of the fact of a claim by the landlord will not alone constitute one a purchaser without notice.<sup>13</sup> The purchaser is bound to make some inquiry into the title to or ownership of the property he is about to purchase. Whether he is or is not a bona fide purchaser and entitled to be protected as such usually depends upon how much diligence he has used in making inquiry. The cases are not altogether in harmony as to the degree of care or the range of inquiry which the purchaser must pursue in order to ascertain the existence of the lien. From the circumstances of the case the purchaser or incumbrancer of a growing crop, for example, must and usually does make some inquiry, as to its ownership and any inquiry he may make of the person in whose possession he finds it will elicit some facts which will put him upon further inquiry. If the occupant of the land claiming ownership of the crops claims also to be the owner of the land the purchaser is in duty bound to verify this by an inspection of the original deed or a copy on the record. If on such inquiry he finds the occupant's statement to be false he has knowledge which will deprive him of his rights of the bona fide purchaser. If the buyer fails to make such inquiry he will conclud-

Toney v. Goodley, 57 Mo. App. 235, 242, 250; Scaife v. Stover, 67 Ala. 237; Chism v. Thompson, 73 Miss. 410, 19 So. Rep. 210; Bledsoe v. Mitchell, 52 Ark. 158, 159, 12 So. Rep. 390.

<sup>12</sup> Thornton v. Carver, 80 Ga. 397, 6 S. E. Rep. 915. A receiver or an assignee for the benefit of the tenant's creditors is not a purchaser in good faith and for value within the rule stated in the text. Burnett v. Bealnear, 79 Md. 36, 28 Atl. Rep. 898.

<sup>13</sup> Blake v. Chas. Counselman & Co., 95 Iowa 219, 222, 63 N. W. Rep. 679; Evans v. Collins, 94 Iowa, 432, 434, 62 N. W. Rep. 810; Eason v. Johnson, 69 Miss. 371, 12 So. Rep. 446; Warren v. Jones, 70 Miss. 202, 14 So. Rep. 25; Belches v. Grimsley, 88 N. Car. 88; Phillips v. Maxwell, 1 Baxt. (Tenn.) 25; Davis v. Wilson, 86 Tenn. 519, 8 S. W. Rep. 151; see Darby v. Jarndt, 85 Mo. App. 274.

sively be presumed to have all the knowledge he might have obtained had he made the inquiry. In all such cases it will be found that there were some circumstances attending the location or the character of the property sold or the situation of the vendor which should have put the purchaser upon inquiry. The purchaser cannot rely upon his ignorance of facts and circumstances where he could have acquired full knowledge by a reasonable inquiry. If he has notice of facts sufficient to put him on an inquiry which, if properly pursued, would have lead to knowledge of the existence of the lien he is not a purchaser in good faith.<sup>14</sup> Whether a purchaser has used ordinary or proper diligence in inquiry is a question upon the facts of the case. On the other hand if the seller of a crop growing on land occupied by him informs the prospective purchaser that he is a tenant the purchaser by that alone has knowledge of a fact that compels him to make further inquiry as to the ownership of the land and whether there is any rent due from the tenant to the landlord. If the purchaser knows the seller is a tenant and has raised the crop sold on the premises he must inquire as to whether the rent is paid,<sup>14a</sup> and if he does not do so he will be presumed to have notice and knowledge of all facts he might thus have ascertained,<sup>15</sup> by due inquiry. The purchaser of a crop grown on rented land who has notice of sufficient facts and circumstances to put a prudent man on inquiry, and to cause him to exhaust all reasonable sources of information is not a purchaser in good faith without notice if he fails to make further inquiry.<sup>16</sup> For it is well settled that the fact that the purchaser of a crop knows before he buys that it was grown on rented premises is sufficient to put him upon inquiry as to the existence and extent of a landlord's lien for unpaid rent.<sup>17</sup> The misrepresentation of the tenant to the pur-

<sup>14</sup> *Boggs v. Price*, 64 Ala. 514.

<sup>14a</sup> *Kelly v. Eyster*, 102 Ala. 325, 14 So. Rep. 657; *Lomax v. Le Grand*, 60 Ala. 537.

<sup>15</sup> *Watt v. Scofield*, 76 Ill. 261, 263; *Hunter v. Whitfield*, 89 Ill. 229, 233; *Dawson v. Coffey*, 48 Mo. App. 109; *Lehman v. Stone* (Tex. 1891) 16 S. W. Rep. 784.

<sup>16</sup> *Maelzer v. Swan*, 75 Kans. 496, 89 Pac. Rep. 1037. In *Stadel v. Aikins*, 65 Kan. 82, 68 Pac. Rep.

1088, it is said, "The notice to the purchaser may be constructive as well as actual and a knowledge of the facts which should put a purchaser upon inquiry as to the tenancy, the landlord's lien, and the non-payment of rent is notice of whatever the inquiry would have disclosed. *Neifert v. Ames*, 26 Kan. 515; *Scully v. Porter*, 57 Kan. 322, 46 Pac. Rep. 313.

<sup>17</sup> *Harvey v. Hampton*, 108 Ill.

chaser of his crops upon which the landlord has a lien for rent that the rent has been paid is not binding upon the landlord.<sup>18</sup> It is the purchaser's duty to make inquiry of the landlord. So far as the rights of purchasers who have knowledge of the existence of the relationship of landlord and tenant between the seller of personal property and some third person are concerned it is settled that the statutory lien of a landlord for rent on personal property or the crop of a tenant is paramount to the rights of such purchaser.<sup>19</sup>

App. 501; Reinhardt v. Blanchard, 78 Ill. App. 96; Sloan v. Hudson, 119 Ala. 27, 24 So. Rep. 458; Foxworth v. Brown, 120 Ala. 59, 24 So. Rep. 1; Kelly v. Eyster, 102 Ala. 325, 14 So. Rep. 657; Hays v. Gerry, 104 Iowa, 455, 73 N. W. Rep. 1028. See, also, Thigpen v. Maget, 107 N. Car. 39, 12 S. E. Rep. 272; Graham v. Seignious, 53 S. Car. 132, 31 S. E. Rep. 51; Toney v. Goodley, 57 Mo. App. 235, 242.

<sup>18</sup> Williams v. De Lisle Store Company, 104 Mo. App. 567, 79 S. W. Rep. 487.

<sup>19</sup> Dulany v. Dickerson, 12 Ala. 601, 604; Hussey v. Peebles, 53 Ala. 432, 436; Boggs v. Price, 64 Ala. 514; Aderholds v. Blumenthal, 95 Ala. 66, 69, 10 So. Rep. 230; Ehrman v. Oats, 101 Ala. 604, 606, 14 So. Rep. 361; Scott v. Renfro, 106 Ala. 611, 614, 14 So. Rep. 556; Couch v. Davidson, 109 Ala. 813, 321, 19 So. Rep. 507; Volmer v. Wharton, 34 Ark. 691, 692; Carter v. Andrews, 56 Ill. App. 646; Prettyman v. Unland, 77 Ill. 206; Watt v. Scofield, 76 Ill. 261, 263; Hunter v. Whitfield, 89 Ill. 229, 233; Kennard v. Harvey, 80 Ind. 37, 41; Holden v. Cox, 60 Iowa, 449, 450, 15 N. W. Rep. 269; Mabry v. Harp, 53 Kan. 398, 400, 36 Pac. Rep. 743; Dunn v. Kelly, 57 Miss. 825, 826; Wooten v. Gwyn, 56 Miss. 422; Cohn v.

Smith, 64 Miss. 816, 819, 2 So. Rep. 244; Belshe v. Batdorf, 98 Mo. App. 627; 73 S. W. Rep. 888; Thigpen v. Maget, 107 N. Car. 39, 44, 12 S. E. Rep. 272; Boone v. Darden, 109 N. Car. 74, 76, 13 S. E. Rep. 728; York v. Carlisle, 19 Tex. Civ. App. 269, 46 S. W. Rep. 257; Mathews v. Burke, 32 Tex. 419; Marsalis v. Pitman, 68 Tex. 624, 5 S. W. Rep. 404; Lewis v. Arnold, 13 Grat. (Va.) 454; *contra* Hadden v. Knickerbocker, 70 Ill. 677, 22 Am. Rep. 80; Craddock v. Riddlesbarger, 2 Dana (Ky.) 205; Warren v. Jones, 70 Miss. 202, 14 So. Rep. 25. In the State of Iowa the rights of a purchaser from a tenant are at a minimum. He is bound to ascertain whether his vendor is a tenant and whether the landlord assents to the sale. Neeb v. McMillan, 98 Iowa 718, 68 N. W. Rep. 438; Hays v. Berry, 104 Iowa, 455, 73 N. W. Rep. 1028; Staber v. Collins, 124 Iowa, 543, 100 N. W. Rep. 527. In Richardson v. Petersen, 58 Iowa, 724 (13 N. R. 63) on page 726 it is said, "The lien given by the statute is a charge upon the property specified, to secure the rent due under the lease. It attaches to the property and cannot be defeated by the sale or removal thereof. If it could be defeated in that way at the option of the tenant, the se-

**§ 835. Priorities between liens of the landlord and liens of chattel mortgagees.** In determining whether the lien which a landlord has for rent or for advances is or is not subordinate to the lien of a chattel mortgage upon the property to

curity would be worthless, and the purpose of the statute to protect the landlord would be defeated. The vendor of personal property transfers the title and interest he holds therein, subject to liens recognized by the law. This rule prevails in all cases except those wherein a purchaser, without notice, is protected by statute as under the registry laws. If a statute creating a lien provides for no protection in favor of persons having no notice thereof, property subject thereto cannot be transferred, free of the lien, on the ground that the purchaser has no notice of its existence. Unless these principles be recognized, the lien conferred by the statute above quoted would fail to give protection to the landlord." In Alabama it has been held that actual knowledge is not necessary to charge a purchaser of cotton from a tenant with notice of the landlord's lien. Whatever is sufficient to put him on inquiry is also sufficient to charge him with notice. If the purchaser have knowledge of facts sufficient to excite such inquiry, or a knowledge of facts which would naturally and reasonably be calculated to arouse suspicion of the main fact, notice of which is sought to be charged to him, the duty of inquiry exists and he must exercise it. *Foxworth v. Brown*, 120 Ala. 59, 24 So. Rep. 1. "One who purchases the crop with notice of the landlord's lien is liable to pay the landlord the value of the crop,

purchased not to exceed the rent due or payable. It would seem to follow that one who purchased the crop without notice would take it free from all claims or liens of the landlord. Secret liens are not favored by our law. The legislation of this state has ever been against the rights of lien holders who do not in some of the modes prescribed by statute give notice of their lien. A party holding a lien on real estate may lose it if he does not have the same recorded in the office of the register of deeds, of the county where the property is situated, or gives actual notice in some manner to those about to deal with the owner thereof. It is so in cases of liens by mortgages or otherwise on personal property. If the instrument containing such lien is not filed in the office of register of deeds of the county where the property is situated, and a person purchases the same from the owner thereof who has possession of the property and has no knowledge of such lien, he takes it freed from the lien. A tenant who raises a crop on leased land where he is required to pay cash rent, is the owner of the crops raised by him subject only to the lien of the landlord for rents due and payable; but he may sell and dispose of the crop and pass a title to the purchaser, the purchaser being liable to pay the landlord the value of the crops purchased, if purchased with notice of such lien. But if the purchaser has no notice

which the landlord's lien attaches we must first determine whether the landlord's lien was created by contract in the lease or by a statute, second whether the chattel mortgage was executed prior or subsequently to the creation or commencement of the lien of the landlord, and third the character of the personal property in question. If the lien of the landlord is created solely by a stipulation in the lease it will be subordinate to the lien of a chattel mortgage executed and filed or recorded prior to the date of the execution of the lease.<sup>19a</sup> As against a mortgage of chattels executed subsequently to the execution of a lease creating a lien, the lien created by the lease is not prior unless the lease has either been recorded in the manner prescribed for the recording of chattel mortgages or unless the subsequent mortgagee has actual notice or knowledge of the existence of the lien created by the lease.<sup>20</sup> In determining priorities claimed for statutory liens in

of the lien of the landlord, he takes them freed from any lien, unless he is in possession of such facts as would put a reasonably prudent person on inquiry as to whether the crops were raised on leased premises and whether the rents were paid." By the Court in Scully v. Porter, 3 Kan. App. 493 on pp. 501, 502, 43 Pac. Rep. 824. "The statute requires no construction. It is plain and unambiguous. It creates a lien upon the crops grown or growing for the rent of the demised premises, which no one denies. The only question is as to the effect which shall be given to the lien thus created. We are asked to extend by construction, the force and effect of this lien beyond that of any other mere lien known to the law. In respect of chattel mortgages there is constructive notice by the record. The lien created in favor of mechanics and material men is upon immovable property, in respect of which the purchaser can readily discern any recent improvements or changes; and yet the

lienor, by express statute, to protect himself against subsequent purchasers or incumbrancers, is required to file notice of his lien, in a public office. The lien of an execution is at least based on the fact that there is a judgment rendered by some court of competent jurisdiction, where the record thereof remains. The legislature has in every such case taken precaution that notice shall be given for the protection of *bona fide* purchasers, but in respect of the lien created in favor of landlords no provision is made, but it is left to be governed by the same rules applicable to the liens of executions and the like liens." By the court in Finney v. Harding, 136 Ill. 573, on p. 583.

<sup>19a</sup> Rand v. Barrett, 66 Iowa, 731, 736, 24 N. W. Rep. 530; see, also as to statutory lien, Perry v. Waggoner, 68 Iowa, 403, 405, 27 N. W. Rep. 292.

<sup>20</sup> Abrams v. Sheehan, 40 Md. 446, 459; Everman v. Robb, 52 Miss. 653, 24 Am. Rep. 682. If the landlord would retain priority

favor of the landlord much depends upon the character of the personal property and upon the express language of the statute. So far as liens for advances made by the landlord to the tenant to aid him in making or harvesting a crop are concerned it has been held that the landlord's lien for advances is paramount to the lien of a chattel mortgage executed and filed prior to the coming into existence of the lien of the landlord.<sup>21</sup> So also a land-

over a mortgage executed during the term, he must record his lease as a chattel mortgage. *Smith v. Dayton*, 94 Iowa, 102, 62 N. W. R. 650; *Gandy v. Dewey*, 28 Neb. 175, 178, 94 Iowa, 102, 62 N. W. R. 650, 44 N. W. Rep. 106; *Duffus v. Bangs*, 122 N. Y. 423, 428, 25 N. E. Rep. 980. See also, *Lamphere v. Lowe*, 3 Neb. 131; *Thomas v. Bacon*, 34 Hun (N. Y.) 88; and *Sheldon v. Connor*, 48 Me. 584. Recording a lease as a conveyance and not as a chattel mortgage is not sufficient. *Duffus v. Bangs*, 122 N. Y. 423, 428, 25 N. E. Rep. 980, 34 N. Y. St. Rep. 222. Actual notice of an equitable lien by contract of lease coming to the knowledge of a subsequent chattel mortgagee is sufficient though the lease is not recorded. *Wright v. Bircher*, 5 Mo. App. 322, affirmed in *Wright v. Bircher's Ex'r*, 72 Mo. 179, 188, 37 Am. Rep. 433.

<sup>21</sup> *Hamilton v. Maas*, 77 Ala. 283; *Dunlap v. Steele*, 80 Ala. 424; *Leslie v. Hinson*, 83 Ala. 266, 3 So. Rep. 443; *Ford v. Crewell*, 9 Houst. (Del.) 179, 31 Atl. Rep. 715; compare *contra Repplier v. Buck*, 5 B. Mon. (Ky.) 96; *Johnson v. Morrison*, 5 B. Mon. (Ky.) 106. The lien of a landlord for rent or advances upon a growing crop ordinarily attaches as soon as the rent becomes due and sometimes even before it becomes due to all the crop whatever its condition of growth may be. The landlord has

a lien though no part of the crop has appeared above the ground. Consequently his lien is paramount to a subsequent mortgage of the crop by one who knows or who ought to know that the mortgagor is a tenant. *Salina State Bank v. Burr*, 7 Kan. App. 197, 52 Pac. Rep. 704, 705, 706; *Dunlap v. Dunseth*, 81 Mo. App. 17, 22; *Lane v. Pollard*, 88 Mo. App. 326; *Airey v. Weinstein*, 54 Ark. 443, 16 S. W. R. 123; *Titsworth v. Frauenthal*, 52 Ark. 254, 12 S. W. Rep. 498; *Beall v. James Folmar Sons & Co.*, 122 Ala. 414, 26 So. Rep. 1; *Shepherd v. Taylor*, 105 Ala. 507, 17 So. Rep. 88; *Seisel v. Folmar*, 103 Ala. 491, 15 So. Rep. 850, 852; *Ferguson v. Murphy*, 117 Cal. 134, 48 Pac. Rep. 1018; *Marshall v. Luiz*, 115 Cal. 622, 47 Pac. Rep. 597; *Ford v. Clewell*, 9 Houst. (Del.) 179; *Brackenridge v. Millen* (Tex.) 16 S. W. 620; *Association v. Cochran*, 60 Tex. 620; *Austin v. Welch*, (Tex.) 72 S. W. Rep. 881; *Liquid Carbonic Acid Mfg. Co. v. Lewis*, 32 Tex. Civ. App. 481, 75 S. W. Rep. 47; *Crinkley v. Egerton*, 113 N. Car. 444, 448, 18 S. E. Rep. 669; *Cooper v. Kimball*, 123 N. Car. 120, 31 S. E. Rep. 346; *Perry v. Perry*, 127 N. Car. 23, 37 S. E. Rep. 71; *Millsaps v. Tate*, 75 Miss. 150, 153, 21 So. Rep. 663; *Edelen v. Strong*, 34 Mo. App. 287; *Dowie v. Christen*, 115 Iowa, 364, 88 N. W. Rep. 830; *Staber v. Collins*, 124 Iowa, 543, 545, 100 N. W. Rep. 527; *German*

lord's statutory lien for rent on the tenant's goods taken upon the premises to commence with the tenancy is paramount so long as the goods remain on the premises, both to a subsequent chattel mortgage thereon,<sup>22</sup> and to one executed by the tenant before the goods were taken upon the premises.<sup>23</sup> As against a chattel mortgagee of the tenant's personal property, the landlord endeavoring to enforce his lien for rent must show that he has acted in the utmost good faith. He must prove by satisfactory evidence that neither by word nor conduct has he deceived the mortgagee as to the existence of his lien. And if he fails to do this he will lose the priority over the chattel mortgagee which otherwise he would have enjoyed. The relation of vendor and vendee cannot, where the vendee is in possession, be transformed into that of landlord and tenant to the prejudice of innocent third parties whose rights have accrued while the vendee was in possession. A stranger to the contract who, knowing the vendee is not a tenant when he deals with him, parts with valuable consideration, cannot be deprived of his equity by a subsequent change in the relation of the parties affected without his consent. Thus, where a vendee in possession mortgages his crops and afterwards, with the consent of the vendor, abandons his right to purchase and becomes the vendor's tenant, the lien of the mortgage is paramount to the lien of the vendor for the rent.<sup>24</sup>

**§ 836. The renewal of a lease giving a lien which is prior to a mortgage.** Whether the surrender of a lease under which the landlord has a lien which is prior in point of time to the lien of a chattel mortgage executed by the tenant and the execution of a new lease by the parties, deprives the landlord of his priority, has been variously determined. It has been held that

State Bank v. Herron, 111 Iowa 25, 82 N. W. Rep. 430; Smith v. Meyer, 25 Ark. 609; Tomlinson v. Greenfield, 31 Ark. 557, 559; Lambeth v. Ponder, 33 Ark. 707, 708; Buck v. Lee, 36 Ark. 525, 528; Beckwith v. Bent, 10 B. Mon. (Ky.) 95; Berkey-Gay Furniture Co. v. Sherman Hotel Co., 81 Tex. 135, 16 S. W. Rep. 807; Rogers v. Grigg, (Tex. Civ. App.) 29 S. W. Rep. 654; compare Frye v. Hill, 14 Wash. St. 83, 43 Pac. Rep. 1097.

<sup>22</sup> Webb v. Sharp, 80 U. S. 14, 16, 20 L. Ed. 478; Beall v. White, 94 U. S. 382, 387; 24 L. Ed. 173; Bryan v. Sanderson, 2 MacArthur, (D. C.) 431; Hechtman v. Sharp, 3 MacArthur (D. C.) 90.

<sup>23</sup> Ford v. Clewell, 9 Houst. (Del.) 179, 31 Atl. Rep. 715; Gilbert v. Greenbaum, 56 Iowa, 211, 9 N. W. Rep. 182.

<sup>24</sup> Wilczinski v. Lick, 68 Miss. 596, 598, 10 So. Rep. 73; Nobles v. McCarty, 61 Miss. 456.

in the absence of some express statutory provision, the making of a new lease after the expiration of a term, during which the lien of a chattel mortgage has attached to personal property upon which the landlord had a prior statutory or express lien does not give the chattel mortgage priority over the lien. The lien existing under the earlier lease survives, passes over and is annexed to any subsequent lease retaining its priority over a chattel mortgage by the tenant of which the landlord has no actual knowledge. The surrender of a lease which had not expired is not a waiver by the landlord of a statutory lien he had for rent thereunder where a new lease is at once executed in its place as against a chattel mortgage covering goods to which the lien attached and which was executed by the lessee prior to the surrender but of which the lessor had no knowledge.<sup>25</sup> Under a statute giving a priority over the landlord's lien to all liens on personal property created before the property was placed upon the premises, and providing that in a case where a lien is created while the property is on the premises the landlord shall have a prior lien for one year's rent only, a mortgage lien created during one term gains priority over a landlord's lien for rent under a subsequent lease.<sup>26</sup> In Virginia, where by statute all liens by mortgage or otherwise created after the commencement of any tenancy are subject to a landlord's claim for rent, the termination or surrender of a lease, and the giving of a new lease after a chattel mortgage has been given, subordinates any lien or claim for rent which the landlord may have under the new lease to the lien of the mortgagee if it has been properly recorded.<sup>27</sup> The goods upon which the landlord may have a lien under the second or subsequent lease while used upon the premises are in theory subject to the same conditions as though a lien had attached to them before they had been placed or taken upon the premises.

**§ 837. The priority of the landlord's lien over the claims of third persons for supplies, or labor to make crop.** The lien of the landlord on the crop for his rent or for advances by

<sup>25</sup> Rollins v. Proctor, 56 Iowa, 326, 329, 9 N. W. Rep. 235. Wades v. Figgatt, 75 Va. 575, 582; Upper Appomatox Co. v. Hamilton,

<sup>26</sup> Lyons v. Deppen, 90 Ky. 305, 14 S. W. Rep. 279. 83 Va. 319, 323, 2 S. E. Rep. 195; so, also, in Iowa Gassnick v. Steffenson, 112 Iowa, 688, 84 N. W. Rep. 945.

<sup>27</sup> City of Richmond v. Duesberry, 27 Grat. (Va.) 210, 215;

him, or to secure other indebtedness due him from his tenant, is ordinarily prior to the lien of third persons for advances which they have made to the tenant to enable him to make or to harvest the same crop.<sup>28</sup> The crop comes into existence with the statutory lien of the landlord as an inherent incumbrance upon it which the tenant cannot, by any action on his part, defeat or divest. If subsequently thereto he purchases supplies to enable him to cultivate or harvest the crop, the lien of the person selling the supplies, if he have a lien at all, will be subordinate to the prior existing lien of the landlord.<sup>29</sup> And when it is by statute expressly enacted that the lien of the landlord either for rent or for supplies shall be preferred to all other liens, the lien of a merchant for his advances in money or goods to the tenant arising under a contract executed prior to the lease, is subordinate to the lien for rent arising under a subsequent letting.<sup>30</sup> The lessor may by express contract waive the priority which he may have over the lien of a factor or other person who has made advances to the tenant. His agreement that his privilege and lien shall be inferior and subordinate to the lien of another person will be strictly construed against the subsequent lienor. He is thereby placed in the position of a second incumbrancer, but neither the landlord's lien nor his remedy to enforce it is wholly lost. The landlord is not prevented thereby from seizing the crop or other property subject to the lien and selling it for his rent, though he has lost his prior claim to the proceeds of sale which he must then, so far as is required, pay to the prior incumbrancer.<sup>31</sup> But a landlord who expressly agrees with a merchant that he will not make advances to his tenant if the merchant will do so, waives his lien on the crop<sup>32</sup> as to all subsequent advances by the

<sup>28</sup> Wells v. Thompson, 50 Ala. 83, 85; Lake v. Gaines, 75 Ala. 143; Brown v. Hamil, 76 Ala. 506; Barnett v. Warren, 82 Ala. 557, 561, 2 So. Rep. 457; Carroll v. Bunker, 43 La. Ann. 1078, 1194, 10 So. Rep. 187; Strauss v. Baley, 58 Miss. 131; Goodwin v. Mitchell, (Miss. 1905) 38 So. Rep. 657; Thigpen v. Leigh, 93 N. Car. 47, 50; Brewer v. Chappell, 101 N. Car. 251, 254, 7 S. E. Rep. 670; Crinkley v. Edgerton, 113 N. Car.

444, 18 S. E. Rep. 669; Ballard v. Johnson, 114 N. Car. 141, 144, 19 S. E. Rep. 98; Brewster v. McNab, 36 S. Car. 274, 15 S. E. Rep. 233.

<sup>29</sup> Strauss v. Baley, 58 Miss. 131, 137.

<sup>30</sup> Brewer v. Chappell, 101 N. Car. 251, 254, 7 S. E. Rep. 670.

<sup>31</sup> Saloy v. Bloch, 136 U. S. 338, 346, 10 Sup. Ct. R. 996, 34 L. Ed. 668.

<sup>32</sup> Coleman v. Siler, 74 Ala. 435.

landlord. So an agreement in parol by a landlord that he will assign a lien for supplies which is created by a contract to a third person who, relying upon such an agreement, furnishes the tenant with supplies, is a waiver of the lien by the landlord and all supplies furnished by the third person come under the security of the landlord's lien.<sup>33</sup> If a landlord knows that another person has contracted to furnish his tenant with supplies to make a crop and has taken security therefore, the landlord cannot himself furnish the supplies and claim a lien without notice to the third person to furnish the supplies as agreed and a failure on his part to comply with the notice.<sup>34</sup> Nor can a landlord claim priority for his lien for advances to a sub-tenant which the landlord made without the knowledge of his own lessee over advances to the sub-tenant made by third persons<sup>35</sup> at the request of the lessee. A landlord's lien for rent created by statute is paramount to a lien created by the tenant in favor of a laborer by an agreement that he would give him a portion of the crop for his services in cultivating it.<sup>36</sup> But where a statute expressly gives wages for services performed within a limited period before goods were seized under legal process, priority over all other claims, the lien of a tenant's employee for such wages is paramount to the landlord's lien on the crop,<sup>37</sup> and also to an attachment to enforce the lien.<sup>38</sup>

**§ 838. Priorities as between the landlord's lien and the lien of an attaching creditor.** The statutory lien of the landlord for rent or for his advances to a tenant, whether on crops or on other chattels, is usually paramount to an attachment subsequently levied on the same chattels.<sup>39</sup> The same preference over subsequent attachments is enjoyed by

<sup>33</sup> *Baldwin v. McCarthern*, 94 Ga. 622, 21 S. E. Rep. 578.

<sup>34</sup> *Paxton v. Meyer*, 58 Miss. 445.

<sup>35</sup> *Moore v. Faison*, 97 N. Car. 322, 2 S. E. Rep. 169. The statute gave the lessor a lien on the crops until he "shall have been paid for all advancements made and expenses incurred in making and saving said crops."

<sup>36</sup> *Rousey v. Mattox*, 111 Ga. 883, 36 S. E. Rep. 925.

<sup>37</sup> *Stuart v. Twining*, 112 Iowa, 154, 83 N. W. Rep. 891.

<sup>38</sup> See *Reynolds v. Black*, 91 Iowa, 1, 58 N. W. Rep. 922; *St. Paul Title Ins. Co. v. Diagonal Coal Co.*, 95 Iowa, 551, 64 N. W. Rep. 606.

<sup>39</sup> *Sevier v. Shaw*, 25 Ark. 417; *Thompson v. Mead*, 67 Ill. 395, 397; *Mead v. Thompson*, 78 Ill. 62, 63; *Harman v. Judge*, 6 La. Ann. 768; *Sullivan v. Cleveland*, 62 Tex. 67, 681; *Ghio v. Shutt*, 78 Tex. 375, 14 S. W. Rep. 860.

a lien created by the language of the lease though the lease has not been filed or recorded as a chattel mortgage.<sup>40</sup> In all cases where the lien of the landlord for rent is prior to the lien of an attachment, the officer levying the attachment must, after a sale under the attachment, first pay the rent from the proceeds of the sale by him.<sup>41</sup> The landlord ought to notify the officer of his claim or lien, with particulars as to its character and amount. The rule of priority just stated applies to all cases where a lien for rent exists before rent is due, or where rent is actually due when the attachment is levied. If, however, no lien is enforceable until rent is due, and no rent is due, a sale under an attachment at the suit of a creditor, is valid as against an action aided by an attachment brought by the landlord to collect rent thereafter accruing.<sup>42</sup> The landlord may recover the rent from the creditor and his sureties in an action at law,<sup>43</sup> on the principle of money had and received where personal property, subject to a landlord's lien, has been sold under an attachment.

**§ 839. General rule as to the landlord's priority over an execution creditor.** By the statute of 8 Anne, C. 14, it was provided that "after the 1st day of May, 1710, no goods or chattels," etc., "lying or being upon any messuage lands," etc., "which are or shall be leased for life or term of years, or otherwise, shall be liable to be taken on any execution on any pretense whatever, unless the party at whose suit the said execution is sued out shall, before the removal of such goods off the premises by virtue of such execution, pay to the landlord of said premises or his bailiff all such sums as shall be due for rent for the premises at the time of the taking of such goods or chattels by virtue of such action, provided said arrears do not amount to more than

<sup>40</sup> Metcalfe v. Fosdick, 23 Ohio, St. 114, 120; Groton Mfg. Co. v. Gardiner, 11 R. I. 626, 629. The attaching creditor after removing the attached goods from the premises which are subject to the landlord's lien cannot compel the landlord to proceed against property of the tenant subsequently placed by him upon the premises. Needham Piano & Organ Co. v. Hollingsworth, (Tex.) 40 S. W. Rep. 70.

<sup>41</sup> Smith v. Huddleston, 103 Ala. 223, 15 So. 521.

<sup>42</sup> Clark v. Haynes, 57 Iowa 96, 98, 10 N. W. Rep. 292. As to the rights of a landlord to the proceeds of property sold at auction under an attachment with his consent as against the attachment creditors of his tenant. See Bergman v. Guthrie, 89 Iowa 290, 56 N. W. Rep. 502.

<sup>43</sup> Ghio v. Shutt, 78 Tex. 375, 14 S. W. Rep. 860.

one year's rent." The effect of such a statute is to give the landlord a lien on the personal property of his tenant which is prior to the lien of an execution. Statutes of an identical character and effect have been enacted in some of the states.<sup>44</sup> Where goods of a tenant which would be liable to a distress are levied on and sold under an execution, the landlord is entitled to be paid out of the proceeds all rent which has accrued prior to the levy not exceeding one year's rent but not rent which accrues thereafter.<sup>45</sup> The landlord cannot compel the sheriff to pay his rent out of the proceeds of sale for succeeding periods during which he keeps the goods upon the premises.<sup>46</sup> These statutes are not applicable to money due the landlord for the use and occupation of the premises.<sup>47</sup> In construing the statute it has been held in one case that a constable is within the provisions of such a statute though sheriffs only are expressly mentioned in it.<sup>48</sup> It is not necessary to protect the claims of the landlord that the goods shall be removed from the premises.<sup>49</sup> But an attachment granted and served on a warrant and the order of court is not an execution within the statute.<sup>50</sup> These statutes being in derogation of the common law must be strictly construed. The effect

<sup>44</sup> *Frazier v. Thomas*, 6 Ala. 169; *State v. Vandever*, 2 Har. (Del.) 397; *Shuster v. Robinson*, 3 Har. (Del.) 50; *Gibson v. Gautier*, 1 Mackey (D. C.) 35; *Wetsel v. Mayers*, 91 Ill. 497; *Ungles v. Graves*, 2 Blackf. (Ind.) 191; *Carpenter v. Shanklin*, 7 Blackf. (Ind.) 308; *Washington v. Williamson*, 23 Md. 244; *Shanks v. Town Council of Greenville*, 57 Miss. 168; *Okolona Sav. Inst. v. Trice*, 60 Miss. 202; *Knox v. Hunt*, 18 Mo. 243; *Second National Bank v. Druiger*, 2 N. J. Law J. 115; *Fishel v. Kerr*, 45 N. J. L. 507; *Gaston v. Tunison*, 10 N. J. Law J. 305; *Fife v. Irving*, 1 Rich Law (S. Car.) 226; *Moss Appeal*, 35 Pa. St. 162; *McCombs Appeal*, 43 Pa. St. 435; *Weltner's Appeal*, 63 Pa. St. 302; *Trimble's Appeal*, 5 W. N. Cas. 396; *Bromley v. Hopewell*, 14 Pa. St. 400, 402.

<sup>45</sup> *Whidden v. Toulmin*, 6 Ala. 104; *Denham v. Harris*, 13 Ala. 465; *Washington v. Williamson*, 23 Md. 244, 251, 252; *Trappan v. Morie*, 18 Johns (N. Y.) 1, 2; *Theriat v. Hart*, 2 Hill, (N. Y.) 380; *Martin's Appeal*, 5 Watts & S. (Pa.) 220; *Purdy's Appeal*, 23 Pa. St. 97; *Collins' Appeal*, 35 Pa. St. 83; *Wickey v. Eyster*, 58 Pa. St. 501; *McWillie v. Hudson*, 1 Tread Const. (S. C.) 119.

<sup>46</sup> *Harris v. Dammann*, 3 Mackey, (D. C.) 90.

<sup>47</sup> *Farmers Bank v. Cole*, 5 Har. (Del.) 418.

<sup>48</sup> *Ungles v. Graves*, 2 Blackf. (Ind.) 191.

<sup>49</sup> *Washington v. Williamson*, 23 Md. 244.

<sup>50</sup> *Thomson v. Baltimore & S. Steam Co.*, 33 Md. 312.

will not be extended by construction to include persons who are not expressly mentioned in them. Thus the owner of the demised premises cannot invoke the aid of the statute to collect rent which is due from his lessee in a case when the goods of a sub-tenant on the premises are sold on execution.<sup>51</sup> The remedy given by the Statute of Anne and by similar statutes in America is confined to the immediate landlord of the tenant whose property is sold.<sup>52</sup> The tenant cannot, by his own declarations or conduct, defeat the landlord's priority. Thus the waiver of the benefit of the exemption law by the tenant in favor of his execution creditor gives the latter no preference over the claim of the landlord under the statute.<sup>53</sup> The landlord may, by laches or express language, waive his priority in favor of the execution. But the taking of a note by the landlord does not waive the landlord's priority under the statute.<sup>54</sup> The landlord has two remedies against an officer who takes property of his tenant on an execution levy without paying the rent. First, he may move the court to which the execution is returnable for an order on the officer to pay over the money raised by the sale under the execution or as much thereof as will satisfy his rent; or, second, he may maintain an action on the case against the officer for taking and removing the property under the execution before his rent is paid.<sup>55</sup> If the goods are sold upon the premises the tenant's remedy is by motion to direct the sheriff to pay the rent due or he may maintain an action on the case against him. The sheriff must have notice that rent is due. No particular form is required. It may state the amount due, when due, and the name of the person to whom rent must be paid, which ought to be verified by the oath of the landlord.

**§ 840. The extent of the priority of the landlord's lien over that of an execution creditor.** The landlord's preference as a lienor or under his distress over the execution creditor as to goods levied on under an execution or upon the proceeds of their sale extends only to the amount of one year's rent.<sup>56</sup> The

<sup>51</sup> Bromley v. Hopewell, 14 Pa. St. 400, 402.

<sup>54</sup> Fife v. Irving, 1 Rich. Law (S. Car.) 226.

<sup>52</sup> Bennett's Case, 1 Stra. 787; Thorsgood v. Richardson, 7 Bing. 420.

<sup>55</sup> Burkett v. Bonde, 3 Dana (Ky.) 208, 212.

<sup>53</sup> Collins' Appeal, 35 Pa. St. 83.

<sup>56</sup> State v. Vandever, 2 Har. (Del.) 397; Travers v. Cook, 42

landlord can, however, compel the sheriff to pay him only as much rent as is due and unpaid up to the date of the levy of the execution, but not rent up to the time of the sale thereunder, and in no case more than for one year.<sup>57</sup> Where a landlord has purchased of his tenant the unexpired term prior to the levy of an execution he will be allowed only the rent which has accrued down to the date of his purchase.<sup>58</sup> The landlord may claim a preference over an execution for rent which is due though the rent is made payable in advance by the lease, provided his claim does not exceed one year's rent.<sup>59</sup> Nor is his claim restricted to the year immediately preceding the date of the levy. It is not material that the time for which the rent is claimed was included in two successive leases, one of which has expired before the levy.<sup>60</sup> The landlord is entitled to a preference for one whole year's rent if that be due, without regard to when the lease commenced or the time of the sale under the levy. For the year's rent to which the landlord is entitled is not necessarily confined to a year ending on the day of the levy. Where it is provided in a lease, requiring the payment of rent in advance, that if during the term the lessee shall be sold out under an execution, the rent for the balance of the term shall at once become due and payable out of the proceeds of the sale, the landlord is

III. App. 580; *West v. Sink*, 2 Geales (Pa.) 274; *Shanks v. Greenville*, 57 Miss. 168; *Gray v. Wilson*, 4 Watts (Pa.) 39.

<sup>57</sup> *Binns v. Hudson*, 5 Binn. (Pa.) 505, 506; *Pierce v. Scott*, 4 W. & S. (Pa.) 344; *Megarge v. Tanner*, 1 Clark (Pa.) 331; *Lichtenhaler v. Thompson*, 13 S. & R. (Pa.) 158; *Case v. Davis*, 15 Pa. St. 80; see, also, *Morgan v. Moody*, 6 Watts & S. (Pa.) 333, holding that the landlord is entitled to his rent to the day of the removal of the goods by the sheriff from the premises.

<sup>58</sup> *Gause v. Richardson*, 4 Houst. (Del.) 222.

<sup>59</sup> *Anderson's Appeal*, 3 Barr. (Pa.) 218; *Beyer v. Fenster-*

*macher*, 2 Whart. (Pa.) 95; *Purdy's Appeal*, 23 Pa. St. 97; *Collins' Appeal*, 35 Pa. St. 83, 87; *Platt v. Johnson*, 168 Pa. St. 47, 49, 31 Atl. Rep. 935, 47 Am. St. Rep. 877; *Goodwin v. Sharkey*, 80 Pa. St. 149, 153.

<sup>60</sup> *Richie v. McCauley*, 4 Pa. St. 471; *Parker's Appeal*, 5 Pa. St. 390, 395; *Ege v. Ege*, 5 Watts, (Pa.) 134. The landlord is not entitled to a priority for an installment of rent which is not due when a levy is made after one installment has been paid in advance and before another has become due. *Purdy's Appeal*, 23 Pa. St. 97, 100; see, also, *Platt v. Johnson*, 168 Pa. St. 47, 49, 31 Atl. Rep. 935, 47 Am. St. Rep. 877.

entitled, on a sale under an execution, to rent which would have matured during the term not to exceed one year's rent.<sup>62</sup> The landlord must, under most statutes, notify the sheriff of his claim for rent.<sup>63</sup> The fact that a distress warrant has been delivered by the landlord to the officer holding the execution against the tenant, does not dispense with the statutory notice,<sup>64</sup> which must be something more than the mere knowledge of the officer and which is in its nature legal process.<sup>65</sup> The notice given by the landlord to the sheriff should state that his claim is for rent, the amount which is due, the time for or during which the rent has accrued, and that the execution debtor was the tenant of the claimant,<sup>66</sup> and it must be verified by the oath of the claimant. The time within which the notice must be given by the landlord depends upon the provisions of the statute. In the absence of an express direction pointing out the precise time when the sheriff must receive the notice, it is immaterial when it is given, so long as it precedes the return of the execution or the payment of the money to the execution creditor.<sup>67</sup> If the officer is notified that the landlord claims his rent out of the proceeds of a sale made under an execution and he, after such notice, pays the proceeds of the sale to the creditor, he will be liable personally to the landlord for the rent.<sup>68</sup> Under the statute of 8 Anne, c. 17, notice is in time if it be served upon the sheriff or other officer levying an

<sup>62</sup> *Platt v. Johnson*, 168 Pa. St. 47, 49, 31 Atl. Rep. 935, 47 Am. St. Rep. 877; see *Owens v. Shovlin*, 116 Pa. St. 371.

<sup>63</sup> *Mitchell's Adm'r v. Stewart*, 13 S. & R. (Pa.) 295; *Washington v. Williamson*, 23 Md. 244, 251; *Bussing v. Bushnell*, 6 Hill, (N. Y.) 382, 383; *Ege v. Ege*, 5 Watts (Pa.) 134; *West v. Sink*, 2 Yeates (Pa.) 374; *Schuylar v. Coach Co.*, 29 W. N. C. 343.

<sup>64</sup> *Bussing v. Bushnell*, 6 Hill (N. Y.) 382, 384.

<sup>65</sup> *Millard v. Robinson*, 4 Hill (N. Y.) 604, 605.

<sup>66</sup> *Olcott v. Frazier*, 5 Hill (N. Y.) 562, 564; *Millard v. Robinson*, 4 Hill (N. Y.) 604, 605; *Van Renselaer v. Quackenboss*, 17 Wend.

(N. Y.) 34; *Miller v. Johnson*, 12 Wend. (N. Y.) 197. The amount due may be stated approximately, *Timmes v. Metz*, 156 Pa. St. 384, 27 Atl. Rep. 248. A notice which fails to show the execution debtor was the tenant of the claimant, is defective, *Millard v. Robinson*, 4 Hill (N. Y.) 604.

<sup>67</sup> *Ege v. Ege*, 5 Watts (Pa.) 134.

<sup>68</sup> *Barlin v. Commonwealth*, 110 Pa. St. 454, 458, 1 Atl. Rep. 404. In Pennsylvania, by statute, a sheriff who returns an execution after his levy and the receipt of a notice of a claim of rent does so at his own risk unless he has the consent of the landlord. *Barlin v. Commonwealth*, 110 Pa. St. 454,

execution before all the goods are taken from the premises.<sup>69</sup> By some of the statutes notice must be given before a sale by the officer.<sup>70</sup>

**§ 841. Priority of a factor's lien over that of a landlord.**

At common law a factor who advances money upon goods consigned to him for sale, has a lien for his advances on the merchandise.<sup>71</sup> The common law rule has been affirmed by statutes in very many of the states. But the lien for advances does not arise until the goods have come into the possession of the factor or of the factor's representative.<sup>72</sup> It is not always absolutely necessary that there should have been an actual or manual delivery of the goods to the factor to give him a lien. The delivery to a factor of a bill of lading of goods shipped him or another is a delivery and pledge of the goods to him and will entitle him to claim a lien for his advances. To the extent of his advances the factor's lien is then paramount and prior to the lien of the landlord upon whose premises, rented to the consignor of the goods, the goods themselves have been grown. Thus the lien of a warehouseman or factor who has in good faith made advances on cotton which has been produced on rented land and which has been stored with him by the tenant, is prior to the lien of the landlord for the rent and to the lien of merchants who have supplied the tenant with fertilizers which have been used by the tenant in raising the cotton.<sup>73</sup> A commission merchant and factor in one state who has made advances upon account to a planter and received and sold, in good faith, cotton shipped in the planter's name to another state, is not answerable for the value thereof to one who had a landlord's lien on the cotton when it was shipped.<sup>74</sup>

458, 1 Atl. Rep. 404; *Timmes v. Metz*, 156 Pa. St. 384, 393, 27 Atl. Rep. 248.

<sup>69</sup> *Margart v. Swift*, 3 McCord (S. C.) 378.

<sup>70</sup> *Bussing v. Bushnell*, 6 Hill (N. Y.) 382.

<sup>71</sup> *Heard v. Russell*, 59 Ga. 25; *Winne v. Hammond*, 37 Ill. 99; *Gragg v. Brown*, 44 Me. 157, 162; *Owen v. Iglanor*, 4 Cold. (Tenn.) 15, 19.

<sup>72</sup> *Oliver v. Moore*, 12 Heisk. (Tenn.) 482; *Frost v. Deutsch*,

(Tex. 1890), 13 S. W. Rep. 981; *Desha v. Pope*, 6 Ala. 691, 41 Am. Rep. 76.

<sup>73</sup> *Clark v. Dobbins*, 52 Ga. 656. But compare *contra*, *Booker v. Jones*, 55 Ala. 266.

<sup>74</sup> *Chism v. Thomson*, 73 Miss. 410, 19 So. Rep. 210; *Hernandez v. Aaron*, 73 Miss. 434, 16 So. Rep. 910. Failure to seize a crop before it is shipped to be sold or within fifteen days after it has been removed from the plantation destroys the landlord's lien in

The lien in Mississippi does not attach to cotton shipped out of the state, and the purchaser is not liable, even though he had actual notice of the existence of the lien. Nor is this rule altered by the fact that the purchaser paid the landlord a portion of the proceeds of the cotton received beyond the limits of the state.<sup>75</sup>

**§ 842. Exemptions from execution.** Either by express statute, in some states,<sup>76</sup> or by necessary implication from the statute in others, the lien of the landlord for his rent is paramount to statutory exemptions of the personal property of the

Louisiana, Carroll v. Bancker, 43 La. Ann. 1078, 1194, 10 So. Rep. 187, affirming Desban v. Pickett, 16 La. Ann. 350; Hotel Co. v. Tarbox, 23 La. Ann. 715; Washburn v. Frank, 31 La. Ann. 427.

<sup>75</sup> Ball Brown & Co. v. Sledge, 82 Miss. 749, 35 So. Rep. 447, 449; Millsaps v. Tate, 75 Miss. 150, 21 So. Rep. 663. The consignment of cotton to a cotton factor or broker engaged in the business of selling cotton for others by a custom of trade crystallized into law confers certain rights and liens on him in respect to said cotton. Among these is the right to make advances on the cotton thereby acquiring a lien with the right to hold said cotton and its proceeds until the advances are paid, or realized out of the proceeds. Such a lien would be paramount to the claim of a third person with whom the tenant had deposited the rent notes of his sub-tenants as security. It would prevail as against any one holding a mere latent equity of which the factor had no notice. And the rights of the factor being a lien coupled with actual possession of the thing on which it rested, it follows that he is a purchaser to the extent of the advance he made and his claims are only subordinate to an out-

standing legal title or a paramount equity of which he had notice. Barnett v. Warren, 82 Ala. 557, 560. "Landlords generally are on or near the rented premises and have better opportunities to look after their rights and interests than purchasers would ordinarily have if the latter were charged with notice of secret liens upon the property purchased. Cotton is almost like bank bills, promissory notes or bonds, passing by delivery, in the due course of trade, through different hands. Under the custom prevailing in this state, the purchaser in most cases does not see the owner of the cotton. It is shipped from a distance over the railroads from the owner to the warehouse man and the purchaser deals exclusively with the latter. Generally it would be impracticable, or almost impossible for the purchaser to ascertain whether the cotton was grown upon rented premises, or whether it is subject to liens of this character or not. By the court in Thornton v. Carver, 80 Ga. 397, quoted with approval in Toney v. Goodley, 57 Mo. App. 235, on page 250.

<sup>76</sup> Stokes v. Burney, 3 Tex. Civ. App. 219, 22 S. W. Rep. 126.

tenant from execution levy.<sup>77</sup> Nor is it essential that a landlord shall contest the exemption before he shall foreclose his lien upon the exempt property.<sup>78</sup> This, however, is not the universal rule. for, on the other hand, it has been held that a landlord's lien for his rent does not include or attach to the tenant's tools of trade which are exempt by statute from the levy of an execution.<sup>79</sup> But it has also been said that a tenant's crop may be sold under a rent lien, though it has been set apart as an exemption by the tenant, as the rent for the land, agreed to be paid by a tenant, is theoretically and constructively the purchase price of the crop<sup>80</sup> paid by the tenant. Though a provision in an instrument waiving the operation and benefit of exemption laws is generally invalid because it is presumed to be against public policy, yet a tenant may by contract create a lien for the rent on exempt property which shall be valid. A provision in a lease creating a lien on exempt property is not regarded by the courts as a waiver of the exemption but as a chattel mortgage in its nature and effect. And it is well settled that the owner may give a valid chattel mortgage on his property, exempt from execution, to the same extent as on any personal property of his.<sup>81</sup>

**§ 843. The subordination of mechanics' liens to rent liens.** The lien of the lessor created by the lease for money advanced by him to a lessee to enable him to erect a building on the demised premises,<sup>82</sup> or an express lien for rent reserved in the lease,<sup>83</sup> is paramount to the lien of a mechanic who, with notice of the landlord's lien, thereafter furnished labor or material for the tenant's buildings. But where by statute it is expressly provided that a lien for things furnished or work done shall attach to buildings in preference to prior liens, a mechanic's lien on buildings owned by the tenant on the premises is paramount

<sup>77</sup> *Taliaferro v. Pry*, 41 Ga. 622; *Shirling v. Kennon*, Ga. 46, S. E. Rep. 630; *ex parte Barnes*, 84 Ala. 540, 4 So. Rep. 769; *Hamer v. McCall*, 121 N. C. 196.

<sup>78</sup> *Ex parte Barnes*, 84 Ala. 540, 4 So. Rep. 769.

<sup>79</sup> *St. Louis Type Foundry v. Taylor*, (Tex.) 35 S. W. Rep. 691; *Drew v. Peer*, (Pa) 9 W. N. Cas. 33.

<sup>80</sup> *Harrell v. Fagan*, 43 Ga. 339.

<sup>81</sup> *Sioux Valley State Bank v. Honnold*, 85 Iowa, 352, 357, 52 N. W. Rep. 244; *Fejavyary v. Broesch*, 52 Iowa, 88.

<sup>82</sup> *Mills v. Matthews*, 7 Md. 315; *Lenderking v. Rosenthal*, 63 Md. 28.

<sup>83</sup> *Young v. West Side Hotel Co.*, 2 Ohio Dec. 140.

to the lien of the landlord for the rent, particularly if the landlord has actual notice of the claims of those who have furnished the material or labor to the tenant.<sup>84</sup>

**§ 844. Subordination of the title of a vendor on condition.** The lien of one who has sold and delivered goods to the tenant on a contract of conditional sale is always subordinate to the lien of the landlord on the goods for rent where the vendor has not executed and recorded the instrument of conditional sale as is required by the statute.<sup>85</sup> Where under the circumstances of any particular case the landlord's lien has priority over the lien of the seller of goods under a conditional bill of sale the landlord cannot usually sell the goods. His lien gives him no greater interest in or claim to the goods than the tenant himself has. The tenant's title to the goods is equitable and not legal and the landlord's remedy under the lien is merely to pay the balance due on the property by the vendee or keep good a tender of the amount and then ask for a specific performance of the contract to sell.<sup>86</sup> It is usually essential under the various statutes that the seller of goods on a conditional bill of sale should file his bill of sale or a properly authenticated copy of it in the office of the official designated by the statute. By neglecting to do this he will lose his priority over the lien of a landlord which takes effect prior to his filing the instrument. The levy of a distress warrant or the commencement of an action to foreclose a lien on property which is included in a conditional sale contract before the actual recording or filing of the bill of sale in the proper county gives the distress or lien a priority over the rights of the vendor.<sup>87</sup>

<sup>84</sup> National Lumber Co. v. Bowman, 77 Iowa, 706, 709, 42 N. W. Rep. 557. If it be assumed theoretically that a lien created by the express terms of a lease is a chattel mortgage the filing of the lease creating the lien would be notice to a person who subsequently files a mechanic's lien against the tenant's personality on the premises.

<sup>85</sup> Gartrell v. Clay, 81 Ga. 327, 331, 7 S. E. Rep. 161; Cohen v. Candler, 79 Ga. 427, 7 S. E. Rep. 160.

<sup>86</sup> Bingham v. Vandegriff, 93 Ala. 283, 9 So. Rep. 280, 281; see Tufts v. Stone, 70 Miss. 54, 11 So Rep. 792, in which it was held that the conditional vendor so long as any installment remains unpaid is entitled to the possession of the goods as against a landlord who has brought a distress for rent, though if only a small balance remained due he might not have this right of possession against the vendee.

<sup>87</sup> Cohen v. Candler, 79 Ga. 427, 429, 7 S. E. Rep. 160.

**§ 845. The taking of additional security for the rent as a waiver of the lien.** A landlord does not of necessity waive his statutory or contract lien by taking a rent note, a mortgage or any other security to secure the payment of the rent with nothing more. Such action upon the part of the landlord, while it may be some evidence of an intention upon his part to waive the lien which he enjoys, is never conclusive but must be considered in connection with all the facts and circumstances in the case.<sup>88</sup> But where a landlord in addition to his lien for supplies furnished by him takes a trust deed on crops to be raised on the premises he waives his statutory lien on the crops raised on the premises and cannot thereafter enforce such a lien as against purchasers of crops raised by sub-tenants upon the land. Nor can the principal tenant mortgage crops not owned by him though raised upon the demised land by his sub-tenant.<sup>89</sup> Accordingly, where a landlord blended the amount which was due him from the tenant for rent with other amounts owing him by the tenant and took the tenant's note for the total amount, payment of which was also secured by a mortgage, he waived his rent lien.<sup>90</sup> The bringing of attachment proceedings for rent which is due is a waiver of the lien for such rent, but not for rent subsequently to become due. A landlord who brings an action to recover the rent and therein attaches the personal property of the tenant upon which he has a lien for the rent, expressly created by the lease, waives the lien.<sup>91</sup> The attachment of the property is regarded as a waiver of the lien which is of an equitable

<sup>88</sup> Coleman v. Siler, 74 Ala. 435; Stephens v. Adams, 93 Ala. 117, 9 So. Rep. 529, 530; Merchants' & Planters' Bank v. Meyer, 56 Ark. 499, 20 S. W. Rep. 406; Miller v. Bider, (Iowa) 105 N. W. Rep. 594; Ladner v. Balsley, 103 Iowa, 674, 72 N. W. Rep. 787; Rollins v. Proctor, 56 Iowa, 326, 330, 9 N. W. Rep. 235; Trimble v. Durham, 70 Miss. 295, 12 So. Rep. 207; Garths v. Good, 50 Mo. App. 149.

<sup>89</sup> Gaines v. Keeton, 68 Miss. 473, 10 So. Rep. 71.

<sup>90</sup> Smith v. Dayton, 94 Iowa, 102, 62 N. W. Rep. 650. The surrender

of a note for rent by the landlord to the tenant is not a waiver of the landlord's lien for any rent which may be due. Wilson v. State (Ala. 1905), 39 So. Rep. 776.

<sup>91</sup> Potter v. Greenleaf, 21 R. I. 483, 44 Atl. Rep. 718 (holding that by doing so he loses his rights as against a prior mortgagee). Compare, *contra*, Carman v. Alabama Nat. Bank, 101 Ala. 189, 13 So. Rep. 581, where it was held that a landlord by bringing attachment under a lien statute to collect rent due did not waive his statutory lien as to rent not yet due.

nature since the remedy by attachment is essentially inconsistent with the enforcement of the lien. The attachment places the property in the hands of the sheriff subject to the usual incidents of an attachment. These are the rights of other creditors to attach it, subject to the prior attachments and the right of mortgagors to apply to the court for the protection of their liens. Thus a mortgagee of property, whose interest is superior to a mere equitable lien, waives his right to foreclose his mortgage by attaching the mortgaged property in a suit to collect the debt for which the mortgage was security.<sup>92</sup> So, also, the action of the landlord in suing and recovering a judgment in *assumpsit*, waives any lien which he may have under the statute.<sup>93</sup> The judgment in the action takes the place of the lien for the goods of the tenant to which the lien attaches, may be sold by virtue of the execution issued thereon. If the landlord, having waived his equitable and statutory rights, proceeds against his tenant at common law, he cannot, after having thus elected a common law remedy, enforce a lien after he has lost his right to sell under execution by his own laches. While the taking of security by the landlord may waive the lien, the taking of a note for rent, which contains a waiver by the tenant of exemption from execution, is not the taking of security which will waive the rent lien given by statute.<sup>94</sup>

**§ 846. The waiver of lien by the landlord by conduct generally.** The landlord may waive his common law right to distrain or his right to enforce a lien for rent created by a statute or by a clause in the lease, either by express language or by any conduct on his part, which is inconsistent with an intention on his part to retain and enforce his lien against his tenant. But his language or conduct, either taken separately or taken together, must be such as would constitute an estoppel on his part under well recognized legal or equitable rules and principles. In the first place, the creation of an express contract lien for rent or advances by the lease is not by implication a waiver by the

<sup>92</sup> *Haynes v. Sanborn*, 45 N. H. 429; *Evans v. Warren*, 122 Mass. 303; *Libby v. Cushman*, 29 Me. 429; *Whitney v. Farrar*, 51 Me. 418; *Potter v. Greenleaf*, 21 R. I. 483, 44 Atl. Rep. 718.

<sup>93</sup> *Howard v. Deens*, (Ala. 1906) 39 So. Rep. 346.  
<sup>94</sup> *Stephens v. Adams*, 93 Ala. 117, 9 So. Rep. 529, 534.

landlord of any lien he may possess under the statute. The two liens are concurrent though relating to the same chattels and the landlord may enforce either.<sup>95</sup> Broadly speaking, if the landlord assent to a sale of the property upon which he has a lien either in express language or by remaining silent when it was his duty to speak, his lien is lost. For the landlord may either, by language or conduct, or by both taken together, assent to the tenant's disposal of his crop or other property to which his lien attaches and by so doing he will waive his lien.<sup>96</sup> When a landlord knows that his tenant is about to sell the crops upon which he has a statutory lien and expressly assents thereto, or by his silence permits the sale to proceed and the purchaser to pay and the tenant to receive the purchase money without asserting his rights to his lien, he is thereby estopped to assert his lien as against the purchaser.<sup>97</sup> It is not essential under this rule that a purchaser or incumbrancer shall know that the landlord has consented to a sale of the crop when he acquires his rights in it.<sup>98</sup> There can be no question that a landlord, who by the terms of the lease, authorizes the tenant to market the crops and to turn over to him a portion of the proceeds, waives his lien on the crops for the rent. His receipt of his share of the proceeds of the sale is a ratification of the action of the tenant in disposing of the crops.<sup>99</sup> And where the evidence is contradictory it is for the jury to determine on all the facts whether the landlord had agreed to per-

<sup>95</sup> *Ladner v. Balsley*, 103 Iowa, 674, 681, 72 N. W. Rep. 787.

<sup>96</sup> *Fulkerson v. Lynn*, 64 Mo. App. 649, 2 Mo. App. Rep. 1272; *Wimp v. Early*, 104 Mo. App. 85, 78 S. Rep. 343, 344; *Blake v. Coates*, 3 G. Greene (Iowa) 548; *Wright v. E. M. Dickey Co.*, 83 Iowa, 464, 468, 50 N. W. Rep. 206; *Randall v. Ditch*, 123 Iowa, 582, 585, 99 N. W. Rep. 190, 191; *Gilliam v. Mither*, Tex. Civ. App., 33 S. W. Rep. 984. "It is a familiar principle that, where one of two innocent parties must suffer for the wrongful act of another, the one who rendered the wrongful act possible must bear the burden. Concede that the landlord

has a lien upon the wheat in full force, he would have prevented injury to himself or the defendant by asserting or making known that lien when he knew the wheat was being sold to an innocent purchaser." By the court in *Wright v. E. M. Dickey Co.*, 83 Iowa, 464, 468, 50 N. W. Rep. 206.

<sup>97</sup> *Planters' Compress Co. v. Howard*, (Texas Civ. App. 1904) 80 S. W. Rep. 119; *T. W. Johnson & Son. v. Kincaid*, (Texas) 81 S. W. Rep. 536.

<sup>98</sup> *Fulkerson v. Lyon*, 2 Mo. App. Rep. 1272.

<sup>99</sup> *Noe v. Layton* (Ark. 1905) 89 S. W. Rep. 1065.

mit the sale of the crops.<sup>1</sup> The landlord may lose his lien by delay. A landlord who under the lease had a right to appropriate the tenant's improvements to the payment of the rent but who never takes any action to enforce his right and who agrees that the premises and improvements may be turned over to a receiver and who receives pecuniary benefit from the receivership, will be conclusively presumed to have waived his lien. He will thereby be estopped as against the receiver and against creditors who have levied an execution prior to the receivership to assert his lien for the rent upon the improvements of the tenant.<sup>2</sup> The landlord may waive his lien by his own deceit or false representations. A person who having acquired a lien willfully conceals his right to enforce it from one who is dealing with the tenant in reference to the goods which are incumbered by the lien so that such persons, relying upon the conduct or statements of the person having the lien acquires title to or rights in such goods will be subsequently estopped to enforce his lien. The landlord may lawfully remain silent unless the circumstances are such that he must speak. If he speaks he must tell the truth as to his lien for if he states that he has no lien and a purchaser from the tenant buys in reliance upon what he has been told the owner of the lien will be conclusively presumed to have waived all his rights.<sup>3</sup> The setting apart of the share of the crop which the tenant is to have as soon as he pays his debt to his landlord but without giving the tenant authority to sell or otherwise to dispose of it is not a waiver of the lien.<sup>4</sup> Inasmuch as a waiver of the lien of the landlord is usually based upon the law of estoppel no consideration for it is required.<sup>5</sup> An arrangement of any sort under which some third person, acting in good faith, has acquired an interest in the crops or other property to which the lien attaches for a valuable consideration relying upon the express assent or

<sup>1</sup> *Planters' Compress Co. v. Howard*, (Tex. Civ. App. 1904) 80 S. W. Rep. 119. As to what does not constitute a waiver of the lien see *Blake v. Chase, Counselman & Co.*, 95 Iowa 219, 63 N. W. Rep. 679, distinguishing *Wright v. E. M. Dickey Co.*, 83 Iowa, 464, 50 N. W. Rep. 206; *Fulkerson v. Lynn*,

64 Mo. App. 649; *White v. McAllister*, 67 Mo. App. 314.

<sup>2</sup> *Sammis v. Poole*, 188 Ill. 396, 58 N. E. Rep. 934.

<sup>3</sup> *Dreyfus v. W. A. Gage & Co.*, 84 Miss. 219, 36 So. Rep. 248.

<sup>4</sup> *Jarrell v. Daniel*, 114 N. Car. 212, 19 S. E. Rep. 146.

<sup>5</sup> *Fulkerson v. Lynn*, 2 Mo. App. Rep. 1272.

silence of the landlord possesses all the elements of an equitable estoppel and it will be treated as such by the court when subsequently the landlord attempts to enforce his lien.<sup>6</sup> A landlord who for a valuable consideration is persuaded by a third person or consents to do certain acts in relation to the property upon which he has a lien by reason of which he loses his lien has an action for breach of contract against the third person upon the refusal or failure of the third person to do what he has agreed to do. A landlord who by the promises of a third person is persuaded to let such third person obtain possession of a crop on which the landlord has a lien, or to retain possession of a crop which a tenant has delivered to such third person may hold the latter on an implied promise to pay the rent where the language or conduct of such third person has lulled the landlord into security and a surrender of possession which was the basis of the lien.<sup>7</sup> An express waiver by the landlord of his lien in favor of a subsequent incumbrancer expressly reciting that person's name but not expressly assignable is personal to such incumbrancer is not meant to be a general waiver and does not enure to the assignee of the incumbrancer.<sup>8</sup> Such a waiver to one of his assigns could doubtless be taken advantage of by an assignee of the mortgage or other instrument owned by the person in whose favor the waiver was executed.

**§ 847. The waiver of the lien by an agent.** The lien of the landlord may be waived by an agent of the landlord having authority actual or apparent to do so. Such a waiver may be implied from the agent's unconditional consent to a sale by the tenant of the property covered by the lien, and the purchaser, under such circumstances, is not liable though the waiver was without consideration.<sup>9</sup> So a landlord may be estopped to assert his lien by his agent taking an inconsistent security in his name.<sup>10</sup> The mere fact of a consent to a sub-letting is not a waiver of the landlord's lien.

\* Wimp v. Early, 104 Mo. App. 85, 78 S. W. Rep. 343.

<sup>7</sup> Shealey v. Clark, 117 Ga. 794, 45 S. E. Rep. 70.

<sup>8</sup> Neeley v. Phillips, 70 Ark. 90, 66 S. W. Rep. 349.

<sup>9</sup> Wimp v. Early, 104 Mo. App. 85, 78 S. W. Rep. 343; see *contra*,

Sugg v. Farrar, 107 N. Car. 123, 125, 12 S. E. Rep. 236. See, also, as to consideration, Griffith v. Gillum, 31 Mo. App. 33, 41.

<sup>10</sup> Gaines v. Keeton, 68 Miss. 473, 10 So. Rep. 71. The mere fact of a consent to a sub-letting is not a waiver of the landlord's lien.

**§ 848. The termination of the lien.** The duration of the statutory lien for rent or for advances which have been made by the landlord to the tenant, depends in every case on the express terms of the statute.<sup>11</sup> In the absence of an express provision to the contrary a statutory lien on crops does not, like the common law remedy of distress, terminate with the end of the term. Nor is the lien usually impaired by the removal of the crops from the premises without the consent of the landlord.<sup>12</sup> But a statutory lien on personal property of the tenant which is kept or used upon the premises during the term, does not attach to property permitted to remain on the premises by the tenant after the expiration of his term as the lien ends with the term,<sup>13</sup> by the express words of the statute. In determining the duration of the lien the statutes are strictly construed. Generally the destruction of the goods which are subject to the lien terminates it. In Louisiana a lien given by statute for rent on the goods of the tenant does not survive the destruction of the goods by fire so as to attach to the proceeds of the insurance policy in the tenant's hands.<sup>14</sup> Nor does a lien on the crop for rent in this state extend beyond the crop of the year for which the rent is due.<sup>15</sup> And from the necessity of the case the lien on crops does not survive the total destruction of the crops, by flood, wind, fire or other casualty. The lien is not destroyed by a mere partial destruction of the crops. Ordinarily it would seem that after the lien had expired no action could be maintained against a purchaser from the tenant though he had purchased subject to the lien. But where a statute expressly provides that a purchaser of a crop from a tenant with knowledge of the lien shall be liable in an action for the value by the landlord, the action may be main-

Williams v. Braden, 63 Mo. App. 513.

<sup>11</sup> In the District of Columbia the lien lasts until three months after the rent has become due. Webb v. Sharp, 80 U. S. 14, 20 Law Ed. 478. In Kentucky and Alabama it continues so long as the tenant occupies and the property remains on the premises. Abraham v. Nicrosi, 87 Ala. 173, 6 So. Rep. 293; English v. Duncan, 14 Bush. (Ky.) 377.

<sup>12</sup> Lomax v. Leyrand, 60 Ala. 537; Couch v. Davidson, 109 Ala. 313, 19 So. Rep. 507; Newman v. Bank, 66 Miss. 323, 5 So. Rep. 753; Appeal of Moss, 35 Pa. St. 162, 164; Zapp v. Johnson, 87 Tex. 641, 30 S. W. Rep. 861.

<sup>13</sup> Bacon v. Carr, 112 Iowa 193, 83 N. W. Rep. 957.

<sup>14</sup> *In re Reis*, 20 Fed. Cas. 11, 684, 3 Woods, C. C. 18.

<sup>15</sup> O'Kelly v. Ferguson, 49 La. Ann. 1230, 22 So. Rep. 783.

tained after the lien is at an end according to the statute provided he can show the crop was purchased during the life of the lien.<sup>16</sup> The payment of the debt is an absolute discharge of the lien. The lien of a landlord given by statute, when satisfied by payment cannot be revived by the agreement of the parties. They may, however, create a new lien by contract. This is not the statutory lien revived but a new lien by contract<sup>17</sup> and it follows that such a lien will be enforced according to the intention of the parties and not by or under the provisions of the statute. The parties to the lease may agree to extend a statutory lien which has not yet expired. Such an agreement must be upon a valuable consideration and it is always a question of construction whether the contract is a new lien or the extension of the old lien.

**§ 849. The remedy of the landlord against one purchasing property subject to his lien.** The cases and statutes are not unanimous in providing a remedy for a landlord against a person who purchases property from a tenant subject to and with notice of the landlord's lien. By some of the authorities it is maintained that the remedy of the landlord against the third person is solely equitable in all cases where there is no remedy expressly provided by statute. In laying down this rule the courts argue that as the landlord's interest is wholly equitable his remedy must also be equitable.<sup>18</sup> The absolute owner of personal property which has been taken from him and sold to another person without his consent may, and indeed must, sue at law for the value of the property which has been converted. He sues in theory at least on an implied contract, or, according to the circumstances of the case, he may sue for damages in tort. But a landlord who has a lien upon the crops of his tenant for rent or advances has no remedy at law against one who has converted the crops, for he is not the legal owner. His right is

<sup>16</sup> Belshe v. Batdorf, 98 Mo. App. 627, 73 S. W. Rep. 888. The purchaser continues liable until the landlord is barred by the statute of limitations.

<sup>17</sup> Tinman v. McMeekin, 42 S. Car. 311, 20 S. E. Rep. 36.

<sup>18</sup> A lien on furniture placed in the demised premises created by

the lease is an equitable lien and not a pledge. A bill to foreclose the pledge is therefore improper and the landlord's remedy is a bill to establish the lien and to procure a sale of the furniture to satisfy it. Potter v. Greenleaf, 21 R. I. 483, 44 Atl. Rep. 718.

equitable and his remedy must also be equitable. His remedy is to foreclose his lien upon the property which is subject to it and for this purpose he may follow the property into the hands of one who received it from the tenant, and if it has been converted into money, he may reach the proceeds of the conversion as well.<sup>19</sup> It is hardly necessary to say that an express provision that a landlord shall have a lien for rent on the personal property of the tenant, does not prevent the tenant from transferring the legal title of the same, subject to the lien.<sup>20</sup> The landlord's lien however created gives him no title to the tenant's property at the common law. He has an equitable right and his remedy is also equitable. A clause in a lease giving the lessor a lien upon crops on non-payment of rent with the same remedies as in the case of a chattel mortgage, does not transfer a title to the landlord so as to enable him to maintain an action for the value of the crop sold by the tenant.<sup>21</sup> A statute giving the landlord a lien on crops growing or grown on the premises for rent, and for the faithful performance of the lease by the tenant, is not enforceable by a common law distress. The statutory procedure<sup>22</sup> must be followed. In those jurisdictions where a contract lien for rent contained in the lease is regarded as a chattel mortgage the landlord's remedy is to proceed as though it were in form as well as in law a chattel mortgage. The pleading or procedure will then be that which is proper in the case of the foreclosure of such a mortgage. The local statutes regulating the foreclosure of a chattel mortgage should be consulted. Where the terms, time and place of sale are not expressly regulated by statute they are within the judicial discretion.<sup>23</sup> A landlord's lien expressly created by a stipulation in the lease may properly be enforced in equity by a suit to foreclose the lien.<sup>24</sup> Such a suit being an equitable proceeding, does not abate on the death of a party or

<sup>19</sup> Judge v. Curtis, 72 Ark. 132, 78 S. W. Rep. 746, 748; Harvey v. Hampton, 108 Ill. App. 501.

<sup>20</sup> Burgess v. Kattleman, 41 Mo. 480.

<sup>21</sup> Streeter v. Ward, 12 N. Y. St. Rep. 333; see Briggs v. Austin, 129 N. Y. 208, 41 N. Y. St. Rep. 378, affirming 29 N. Y. St. Rep. 245, 8 N. Y. Supp. 786.

<sup>22</sup> Lord v. Johnson, 120 Ill. App. 55.

<sup>23</sup> Kuttner v. Haines, 135 Ill. 382, 25 N. E. Rep. 752; affirming 35 Ill. App. 307.

<sup>24</sup> Illinois Starch Co. v. Ottawa Hydraulic Co., 23 Ill. App. 272; affirmed, 17 N. E. Rep. 486, 125 Ill. 237; White v. Thomas, 52 Miss. 49, 52.

on the dissolution of a corporation which is a party, but is subject to a revival.<sup>25</sup> But only so much of the crops as will amount to the rent due, can be sold in an action to foreclose a lien created by the lease.<sup>26</sup>

**§ 850. Action by the landlord in conversion or assumption.** In a few states the authorities hold that the landlord who has a lien may sue the purchaser of the property in an action for its conversion. If the tenant has delivered the possession of the property to another and the latter has converted the same to his own use he may under some of the cases be liable to the landlord for the value of the goods converted.<sup>27</sup> So, too, a landlord who is constructively in the possession of crops subject to a lien may sue therefor in replevin when the crops are removed by the tenant.<sup>28</sup> Generally in an action for the conversion of a chattel

<sup>25</sup> Kelly v. Rochelle, (Tex. Civ. App.) 93 S. W. Rep. 164.

<sup>26</sup> Momrich v. Schwartz, (Neb. 1905) 96 N. W. Rep. 636.

<sup>27</sup> Staber v. Collins, 124 Iowa, 543, 545, 100 N. W. Rep. 527; Holden v. Cox, 60 Iowa, 449, 15 N. W. Rep. 269; Church v. Bloom, 111 Iowa, 319, 82 N. W. Rep. 794; Baker v. Cotney (Ala. 1905) 38 So. Rep. 131; Sugg v. Farrar, 107 N. Car. 123, 125, 12 S. E. Rep. 236; Newman v. Ward (Tex.) 46 S. W. Rep. 868.

<sup>28</sup> Abington v. Steinberg, 86 Mo. App. 639. In the following cases it was held that a landlord could not maintain trover, conversion or replevin against a tenant or against one to whom the tenant had sold the crops without the consent of the landlord. Worrill v. Barnes, 57 Ga. 404; Frink v. Pratt, 130 Ill. 327, 331, 22 N. E. Rep. 819; Sheble v. Curdt, 56 Mo. 437, 440; Hardaman v. Shumate, 19 Tenn. (Meigs) 398, 402; Watt v. Scofield, 76 Ill. 261; Westmoreland v. Wooten, 58 Miss. 825, 828. In a case of a replevin by the landlord the court said, "Under the

terms of the lease the plaintiff was not entitled to the immediate possession of the wheat. His right to such possession had not accrued but depended entirely upon the happening of a certain contingency, viz.: the non-payment of the rent at the time it should become due. This is sufficient to show that he could not, prior to the occurrence of such event have any ground whereon to maintain replevin or its statutory substitute for the property in question. The law gives the landlord a lien on the crops for the rent and the only effect of the clause in the lease above referred to, was to confer authority on the plaintiff when the rent fell due and remained unpaid, to take possession of the wheat, sell the same and apply a sufficiency of the proceeds to the purpose for which he was authorized to take such possession." By the Court in Sheble v. Curdt, 56 Mo. 437, 440. The lien of the landlord for rent is somewhat analogous to the lien of an execution. An execution is a lien upon the personal property of the

the measure of the plaintiff's damages is the fair and reasonable value of the property converted at the time of its conversion. Obviously this measure of damages would not apply to a case where the plaintiff had no valid claim to absolute ownership of the chattel but only a qualified interest therein as a lien. If his claim for rent exceeds in amount the value of the thing converted he ought to have judgment for its full value. But on the other hand if the value of the chattel converted exceeds his claim for rent he ought not to recover any more than will pay his claim which is the value and extent of the interest he has in the chattel.<sup>29</sup> In some states the action of conversion has been held to be exclusive of every other remedy, while elsewhere the landlord may elect between this action and an equitable proceeding to enforce his lien. Clearly a person who with notice of a landlord's lien buys personal property and thereafter destroys it or removes it or otherwise converts or changes its character to the prejudice of the landlord is guilty of a tort. The basis of his wrongdoing is that he destroys and defeats the lien which is a valuable property right. The intent of the purchaser is not material. It is not necessary to show that he bought the crop with an intent to defeat the lien or to deprive the landlord of his remedy thereunder. The intent of a wrongdoer in a civil action for an injury to personal property is not material except perhaps on the question of damages. And as all that can be recovered in an action against the purchaser is the amount of the rent with interest the purpose of the defendant need not be shown if it appear that he purchased with notice of the lien.<sup>30</sup> Where the law affords the landlord no other remedy it has been held that he may maintain an action on the case for the amount of rent due against the purchaser<sup>31</sup> or the landlord may maintain assumpsit against a

debtor which is not exempt from the time it comes in the officer's hands and gives the officer the right to seize and sell the same for the satisfaction of the judgment. But without a levy or reducing the property of the debtor to possession, the officer though having a lien has no title which will enable him to maintain trover for its taking by another. Frink

v. Pratt, 130 Ill. 327, 332, 22 N. E. Rep. 819; following Mulheisen v. Lane, 82 Ill. 117.

<sup>29</sup>This is the statutory regulation in California under Civ. Code, § 3338. Wilkerson v. Thorp, 128 Cal. 221, 60 Pac. Rep. 679.

<sup>30</sup>Hussey v. Peebles, 53 Ala. 432, 436.

<sup>31</sup>Wilson v. Stewart, 69 Ala. 302; Hussey v. Peebles, 53 Ala. 432,

tenant who having sold the property has the proceeds in his possession or against any person to whom he may have paid the proceeds with notice of the lien.<sup>32</sup> Finally it may be said that in every case where a landlord's lien is to be foreclosed, either against the tenant or his vendee the provisions of the local statute as to procedure must be consulted and followed.

**§ 851. The statutory mode of enforcing a lien.** A landlord having a statutory lien is usually limited to his statutory method of enforcing it if there be one. Whether he shall have a concurrent remedy at common law or in equity usually depends on the express language of the statute. A statute which provides a special mode for enforcing the lien may not be exclusive of some other mode of enforcing it unless a provision to that effect is expressly inserted in the statute.<sup>33</sup> The fact that a landlord has a statutory lien upon the tenant's crops or upon his other personal property for rent does not entitle him to replevin the property on which he has a lien before he has taken it into his possession. His proper remedy is by attachment or by a bill

436; *Boggs v. Price*, 64 Ala. 514; *Ehrman v. Oates*, 101 Ala. 604, 606; *Kelly v. Eyster*, 102 Ala. 325, 330, 14 So. Rep. 657. The ruling in these cases is based upon the procedure under the English Statute of 8 Anne. ch. 14, by which the landlord could maintain an action on the case against a sheriff who having notice of a landlord's claim for rent paid over the proceeds of an execution sale to the execution creditor. *Green v. Austin*, 3 Camp. 260; *Calvert v. Joliffe*, 2 Barn. & Ad. 418; *Colyer v. Speer*, 2 Brod. & Bing. 67; *Lane v. Crockett*, 7 Price 566. In Mississippi and perhaps in other States the landlord, under the statutes may maintain an action on the case against a purchaser of a crop who has notice that his vendor is a tenant. It is immaterial whether the purchaser did or did not join with the tenant in re-

moving the crop. *Cohn v. Smith*, 64 Wis. 816, 2 So. Rep. 244.

<sup>32</sup> *Ehrman v. Oates*, 101 Ala. 604, 606, 14 So. Rep. 361.

<sup>33</sup> *Berry v. Berry*, 8 Kan. App. 584, 55 Pac. Rep. 348 (construing 2 Lien St. 1897, c. 121, § 26); *Carman v. Alabama Nat. Bank*, 101 Ala. 189, 13 So. Rep. 581; *Woolley v. Maynes Wells Co.*, 15 Utah 341, 40 Pac. Rep. 647. Under a statute providing that the lien may be enforced by the commencement of an action the landlord may attach the property in the hands of a third person or he may sue his tenant for the rent and to have his lien established and on a judgment in his favor may levy an execution on the property to which the lien attaches though in the hands of a purchaser in good faith who was not a party to the action. *Staber v. Collins*, 124 Iowa, 543, 545, 100 N. W. Rep. 527.

in equity to foreclose the lien.<sup>34</sup> But in a case where the tenant is removing or is about to remove the crops from the premises so as to endanger the landlord's lien the landlord may invoke the summary remedy of replevin. And where by an agreement the landlord was in constructive possession of the tenant's crop when it was about to be removed by the tenant from the premises his case for replevin is sustainable.<sup>35</sup> The landlord by proceeding to attach the property on which he has a lien waives his right to the enforcement of his lien in equity. The two remedies are inconsistent, and the landlord must elect between them. This principle creating an estoppel on the landlord is based upon the analogy of equitable liens to chattel mortgages. For if a mortgagee declines to take possession under his mortgage as he may do and attaches the mortgaged chattel the latter is then in the possession of the law and liable to subsequent attachments by other creditors.<sup>36</sup> Finally it may be said that in the absence of a provision in a lease or statute formulating a contrary rule, a lien for rent, no matter how it has been created is merely a collateral security and the landlord is not confined to his remedy by lien but may sue on the covenant to pay rent in the first instance. The ordinary method of enforcing a landlord lien by legal process may be dispensed with by the consent of the parties. It is not necessary in order to satisfy the lien of the landlord for rent that he should resort to the courts unless the tenant compels him to do so. The tenant may waive his rights to an enforcement of the lien by process of law. Thus if the tenant surrenders his crops to the landlord and authorizes the latter to sell them to satisfy the rent, or if the tenant himself sells them with the consent of the landlord for that purpose, all is accomplished by means of a valid agreement of the parties which could have been accomplished by process of law. Hence an objection by a chattel mortgagee whose mortgage is subordinate to the lien that the sale was invalid is without force or effect.<sup>37</sup>

<sup>34</sup> *Abington v. Steinberg*, 86 Mo. App. 639.

<sup>35</sup> *Abington v. Steinberg*, 86 Mo. App. 639, 641; *Young v. Kimball*, 23 Pa. St. 193.

<sup>36</sup> *Potter v. Greenleaf*, 21 R. I. 483, 484; *Haynes v. Sanborn*, 45 N. H. 429; *Wingard v. Banning*, 39 Cal. 543.

<sup>37</sup> *Auxvasse Milling Co. v. Cornet*, 85 Mo. App. 251.

**§ 852. The remedy of the purchaser of chattels subject to the lien against the tenant.** A purchaser in good faith or for value from a tenant of property which is subject to a landlord's lien and against whom the landlord has recovered a judgment for the rent or for damages in conversion may in turn recover from his vendor, the tenant. In the sale of personal property an implied warranty of good title is always recognized by the courts and the existence of a lien or of a right to distrain for rent due in existence at the date of the sale or mortgage is an incumbrance which, when enforced, will work a breach of the vendor's covenant of implied warranty. On the other hand a seizure or a distress for rent which subsequently falls due from the vendor is not a breach of the covenant of warranty implied on the part of the vendor though even then, where the vendee is damaged by having to pay the rent to the landlord he is not without remedy against his vendor. If the property sold is taken to pay the debt of the vendor the vendee may maintain an action of assumpsit for its value on the theory that the property was compulsorily taken from him by the landlord to pay the debt of the tenant.<sup>38</sup> The vendee need not wait to be sued by the landlord or to have the lien foreclosed but he may pay the landlord without suit if in his judgment he thinks it best to do so. If the lien is foreclosed or if the vendee pays the vendor's rent before he pays the purchase price of the goods the vendee may counterclaim or recoup his damages in an action by the vendor for the purchase price.<sup>39</sup>

**§ 853. Injunction to protect the lien of the landlord.** Conduct on the part of a tenant, upon whose crops the landlord has a lien for rent which may render the enforcement of the lien impossible will justify the issuance of an injunction against the tenant to restrain him from the commission of all acts which will prejudice the landlord by impairing the lien. Particularly would this be the case where the tenant is insolvent. He will be enjoined from selling or mortgaging the crops which are subject

<sup>38</sup> Myers v. Smith, 29 Md. 91, 111.

<sup>39</sup> Hardy v. Matthews, 101 Mo. App. 708, 74 S. W. Rep. 166, where the vendee presumptively at least knew of the lien. And the court in this case also held that the

vendee need not wait to be sued by the landlord or to have him foreclose the lien but he may voluntarily pay the landlord without suit.

to the lien, from removing or permitting others to remove them and also from feeding the crops to his own cattle or to cattle owned by other persons. It matters not that no rent is then due for if the danger to the lien of the landlord is imminent an injunction will be more readily issued where rent is not due. For if the rent has not accrued the lien cannot be enforced nor can the landlord proceed at law until the rent has accrued. Hence as the landlord is without a remedy at law and as no foreclosure of the lien can be had, the necessity for the injunction is imperative when the conduct of the tenant is likely to destroy all advantages which the landlord may have under the lien.<sup>40</sup> Where a tenant is insolvent and had sold a large portion of the crops growing on the land and was feeding from the balance a large number of cattle which were owned by him but which were mortgaged to another person for the purchase price by a mortgage prior to the landlord's lien an injunction will issue on an application by the landlord, restraining the tenant from selling or feeding any of the crops to his cattle which are subject to the lien. A court of equity will interfere upon the ground of the waste which may reasonably be anticipated and upon the extreme probability that if the wasteful conduct of the tenant be not restrained there will not be enough left to satisfy the lien of the landlord.<sup>41</sup> Thus where the landlord has by statute a lien upon the tenant's crop, its removal by the tenant may be enjoined if it shall appear that he is insolvent and has no tangible property which can be attached<sup>42</sup> or levied on under execution. But if the lien is not lost by the removal of the property from the premises, if it can be easily identified after its removal and particularly where the rent is not yet due or in arrears and the tenant is solvent an injunction will not lie.<sup>43</sup> The equitable remedy is intended solely to protect and to preserve the lien and where from all the circumstances it is apparent that the lien is in no danger, and particularly where the tenant is solvent so that the landlord may have an adequate legal remedy equity will not interfere. An injunction will be granted to protect the lien against execution creditors who have levied upon property sub-

<sup>40</sup> Gray v. Bremer, 122 Iowa 110, 97 N. W. Rep. 99.

<sup>42</sup> Gregory v. Hay, 3 Cal. 332.

<sup>41</sup> Gray v. Bremer & Strother, 122 Iowa 110, 97 N. W. Rep.

<sup>43</sup> Carson v. Electric Light Company, 85 Iowa, 44, 51 N. W. Rep. 1144.

ject to the lien and are about to sell it.<sup>44</sup> And generally the fact that the tenant is insolvent or without tangible property which is capable of being made the subject of a levy of an execution is usually considered sufficient to set in motion a court of equity to protect the lien which is in danger from the efforts of other creditors.<sup>45</sup> But the existing or threatened insolvency of the tenant is not always a prerequisite. A solvent tenant may by his conduct endanger his landlord's lien or right to collect rent and under such circumstances the landlord has the right to protection in a court of equity where he has no adequate and speedy remedy at law. Thus an injunction will be granted to restrain the tenant from preventing the landlord from entering upon the premises which is farm land where the lease provided that the landlord might enter and sell the crops for the unexpired term applying the proceeds to the payment of the rent, in case the tenant refuses to give the landlord a chattel mortgage thereon as security for the same. It is sufficient to show that the tenant refused to execute the mortgage for the purpose mentioned, and threatened to remove the crops from the land, leaving the landlord's share of the crops unharvested.<sup>46</sup>

<sup>44</sup> *Click v. Stewart*, 36 Tex. 280, 281.

<sup>45</sup> *Lewis v. Christian*, 40 Ga. 187. A cropper will be enjoined from disposing of the crop where he has no other tangible property. *Schmitt v. Cassilius*, 31 Minn. 7, 16 N. W. Rep. 453. See, also, where an injunction was refused because of the solvency of the tenant in *Milner v. Cooper*, 65 Iowa, 190, 21 N. W. Rep. 558.

<sup>46</sup> *Cole v. Manners*, (Neb. 1906) 107 N. W. Rep. 777. In *Garner v. Cutting*, 32 Iowa, 547, it was held that the landlord might have an injunction to prevent the acts of his tenant which would destroy or impair the security given by the lien and the principle involved was said to be the same as that which authorized a court of equity, at the suit of a mortgagee to en-

join the commission of waste by the mortgagor. This rule must be applied according to the equities of the case. It was not designed to enable the landlord to do more than to protect the security which the law gave him. He should not be permitted to interfere unnecessarily with the business and property of his tenant, nor to use the power which the law gives him in an immeasurable and arbitrary manner. So long as the tenant neither does nor threatens to do any act which materially affects his power to collect the rent for which the lease provides he should not be permitted to interfere with the use of the property by the tenant. The removal of the property from the leased premises does not divest the lien, but it follows the property to

**§ 854. Grounds for granting an attachment.** In many of the States by statutes a right to an attachment is conferred upon landlords the better to enable them to enforce their claims or liens for rent. Under these statutes an attachment may be had in an action to recover rent upon grounds which are very different from the ordinary causes of fraud, non-residency and the like upon which an attachment is ordinarily granted. The usual grounds are a failure to pay rent when due or the removal by the tenant of his crops or other goods from the premises. These statutes however necessary and salutary in their operation are a species of class legislation which landlords enjoy conferring rights upon them not given to creditors generally and they will be strictly construed. The landlord must show that he has complied with all their provisions.<sup>47</sup> Under some of the statutes it is only necessary to show that the rent is unpaid and due<sup>48</sup> or is about to become due with sufficient facts to show that the tenant is about to default.<sup>49</sup> Thus a threat by the tenant to move from the premises while the landlord was out of town, together with the fact that the property of the tenant upon the premises could readily be moved at night, as had happened before, may furnish a reasonable basis for the belief on the part of the landlord that he is going to lose his rent and an attachment should then issue.<sup>50</sup> Other statutes confer the remedy on a landlord only where a tenant removes, or is about to remove his crop without the consent of the landlord.<sup>51</sup> The object of the attachment in all cases of a removal of the crop is to protect the lien of the landlord from

which it has attached so long as it can be identified."

<sup>47</sup> Merrit v. Fisher, 19 Iowa 354, 356; Baxley v. Sechrest, 85 Ala. 183, 4 So. Rep. 865. See Cleveland v. Crum, 33 Mo. App. 616 as to burden of proof.

<sup>48</sup> Chamberlain v. Heard, 22 Mo. App. 416.

<sup>49</sup> Poer v. Peebles, 1 B. Mon. (Ky.) 1; Shiff v. Ezekiel, 23 La. Ann. 383; Thomas v. Dundas, 31 La. Ann. 184; Mulhaupt v. Enders, 38 La. Ann. 744; see, Johnson v. Garland, 9 Leigh (Va.) 149. In one case it was held that a land-

lord should have this remedy if there were reasonable grounds to believe and the landlord did in fact believe that he would lose his rent. Porter v. Sparks, 19 Ky. Law Rep. 1211, 43 S. W. Rep. 220.

<sup>50</sup> Kassel v. Snead, 21 Ky. Law Rep. 777, 52 S. W. Rep. 1058.

<sup>51</sup> Ballard v. Stephen, 92 A<sup>r</sup> 616, 8 So. Rep. 416; Jones v. Eu-banks, 86 Ga. 616, 12 S. E. Rep. 1065; Ragsdale v. McKinney, 119 Ala. 454, 24 So. Rep. 443; McDermott v. Dwyer, 91 Mo. App. 185; Abington v. Steinberg, 86 Mo. App. 639.

being defeated by the sale of the crop to an innocent third party for value. Where the lien attaches to a crop of an under tenant, the removal of his crop by the under tenant, under circumstances which would justify an attachment if the person removing the crop were the immediate tenant, will sustain an attachment against the under tenant.<sup>52</sup> In some cases the motive or intention of the tenant present in removing his crop or other personal property from the premises<sup>53</sup> or the distance which the crop or other property is removed is absolutely immaterial.<sup>54</sup> An attachment may be issued and levied though the tenant is removing his crops or his other personal property from the premises in the regular course of his business.<sup>55</sup> Elsewhere it seems it is not every removal by a tenant of his effects which will authorize an attachment for rent. The removal must be such a one as will defeat a distress for rent or defeat the enforcement of the landlord's lien.<sup>56</sup> But in Kansas the removal of any appreciable portion of the crops is sufficient as the landlord's lien is upon the whole,<sup>57</sup> and in Kentucky and Virginia the right to an attachment exists whenever the landlord has reasonable grounds to apprehend that the effects of the tenant will be removed from the premises<sup>58</sup> or that he will lose his rent. The landlord must allege and prove that the crops or personal effects were removed from the premises<sup>59</sup> without his consent.<sup>60</sup> The consent of a landlord to the removal by the tenant of his crops is a waiver of the right to attach on the ground<sup>61</sup> of removal. It has also been held that the landlord must show such a holding by the defendant as would entitle the landlord to a lien or to distrain, the amount of

<sup>52</sup> *Garroutte v. White*, 92 Mo. 237, 4 S. W. Rep. 681.

yard, 38 Mo. 447, where it is held that the landlord need not show the removal was meant to evade payment of rent.

<sup>53</sup> *Harmon v. Payton*, 68 Kan. 67, 74 Pac. Rep. 618, 619; *Knowles v. Sells*, 41 Kan. 171, 21 Pac. Rep. 102.

<sup>61</sup> *Knowles v. Sells*, 41 Kan. 171, 21 Pac. Rep. 102.

<sup>54</sup> *Masterson v. Bentley*, 60 Ala. 520; *Randolph v. McCain*, 34 Ark. 696; *Knowles v. Sells*, 41 Kan. 171, 173, 21 Pac. Rep. 102.

<sup>62</sup> *McLean v. McLean*, 10 Bush. (Ky.) 167; *Redford v. Winston*, 3 Rand. (Va.) 148.

<sup>55</sup> *Offterdinger v. Ford*, 92 Va. 636, 24 S. E. Rep. 246.

<sup>63</sup> *Knowles v. Steed*, 79 Ala. 427. <sup>64</sup> *De Bardeleben v. Crosby*, 5 Ala. 363; *Busbin v. Ware*, 69 Ala. 279.

<sup>56</sup> *Stamps v. Gilman*, 43 Miss. 456; *Kinear v. Shands*, 36 Mo. 379; but compare *Klein v. Vin-*

<sup>65</sup> *Webb v. Arnold*, 52 Ark. 358, 12 S. W. Rep. 707.

the annual rent and where it is payable and in whose behalf the application is made.<sup>62</sup> Ordinarily the complaint must be verified by the oath of the landlord or of some one having knowledge or information sufficient to form a belief<sup>63</sup> for the grounds for the attachment may usually be stated on information and belief<sup>64</sup> provided the applicant shall allege concisely the facts upon which his belief is founded.<sup>65</sup>

**§ 855. The effect of an attachment.** The rule that the seizure of personal property under and by virtue of an attachment during the pendency of an action is not a satisfaction of the debt has been adjudicated to be applicable to a levy on personal property on a distress warrant or similar process to enforce the payment of rent. The levy of a distress is designed solely as a security to the landlord. The property is the property of the tenant until it is sold under the distress and while it remains in the possession of the sheriff or other distraining officer he is responsible for the exercise of ordinary care for its preservation. If it is destroyed by his negligence he must compensate the owner and the amount which he must pay as damages may subsequently be applied in satisfaction of any judgment which the landlord may obtain in the action. It is only under such circumstances that the landlord is responsible in any way to his tenant whose goods he has distrained.<sup>65a</sup> The rule is otherwise in the case of a levy under an execution. The levy on personal property under an execution raises a presumption that the judgment debt is satisfied wholly or in part according as the value of the property levied upon equals or does not equal the amount of the debt.

**§ 856. The cumulative character of the remedy by attachment.** The statutory provision permitting a landlord to enforce his lien for rent by an attachment is cumulative usually and does not prevent civil action being brought in equity or according to the procedure mentioned in the statute in case of liens

<sup>62</sup> *Yarnall v. Haddaway*, 4 Har. (Del.) 437. 5 S. E. Rep. 485; *Sharp v. Palmer*, 31 S. Car. 444, 10 S. E. Rep. 98.

<sup>63</sup> *Warstell v. Ward*, 1 Bush. (Ky.) 198. <sup>64</sup> *Maxwell v. Stewart*, 22 Wall. (U. S.) 77; *McBride v. Bank*, 28 Barb. (N. Y.) 476; *Taylor v. Felder*, 23 S. W. Rep. 480, 5 Tex. Civ. App. 417.

<sup>64</sup> *Audenreid v. Hull*, 45 Mo. App. 202. <sup>65</sup> *Baum v. Bell*, 28 S. Car. 201.

upon personal property.<sup>66</sup> The landlord is not compelled to take out an attachment but he may enforce his lien by any procedure if within the period mentioned in the statute of limitations.<sup>67</sup> The statute conferring the right to an attachment upon landlords in the absence of an express restriction to a certain class of landlords is general in its application. Hence the right of attachment may exist irrespective of the location or character of the property or the purpose to which it may have been put by the tenant.<sup>68</sup> A right to sue out an attachment which is vested by the statute in the lessor or in his personal representative or assign passes to his administrator or to a person to whom he has assigned the note given him by the tenant for the rent. The personal representative of an assignee may have an attachment.<sup>69</sup>

**§ 857. What property may be attached by the landlord.** The character of the property of the tenant which may be attached by the landlord is usually determined by the statute which must in each case be consulted. Growing crops upon which the landlord has a lien for rent are usually subject to the attachment.<sup>70</sup> By some of the statutes the right to attach for rent is confined to the growing crops of the tenant.<sup>71</sup> An attachment cannot be levied upon the goods of third parties used upon the premises.<sup>72</sup> Under a statute giving the right to an attachment as to all goods upon which the landlord has a lien the fact that he attaches one or two items of personal property upon which he has no lien does not invalidate the attachment.<sup>73</sup> One who, pending the attachment proceedings, acquires title to the goods attached takes them subject to the claims of the landlord if he has notice of the attachment.<sup>74</sup>

<sup>66</sup> Brown v. Noel, 21 Ky. Law Rep. 648, 52 S. W. Rep. 849.

<sup>67</sup> Citizens' Savings Bank v. Wood, 134 Iowa 232, 111 N. W. Rep. 929.

<sup>68</sup> Buck v. Midland Tobacco Works, 62 Mo. App. 775, 1 Mo. App. Rep. 520.

<sup>69</sup> Coker v. Britt, 78 Miss. 583, 29 So. Rep. 833. But compare, Gross v. Bartley, 66 Miss. 166, 5 So. Rep. 225.

<sup>70</sup> Crawford v. Coil, 69 Mo. 588; Hubbard v. Moss, 65 Mo. 647.

<sup>71</sup> Hawkins v. Gill, 6 Ala. 620; Greeley v. Greeley, (Okl. 1903) 73 Pac. Rep. 295.

<sup>72</sup> Schurz v. McMenamy, 82 Iowa, 432, 48 N. W. Rep. 806.

<sup>73</sup> Giddens v. Bolling, 93 Ala. 92, 9 So. Rep. 427.

<sup>74</sup> Union W. & El. Co. v. McIntyre, 84 Ala. 78, 4 So. Rep. 175.



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